



3 1761 11764684 4



Presented to
The Library
of the
University of Toronto
by

Professor W. P. M. Kennedy



Digitized by the Internet Archive
in 2022 with funding from
University of Toronto

A made-up collection of government publications giving the decisions of the Supreme Court of Canada, the judgments of the Judicial Committee of the Privy Council, and the texts of the relevant statutes in the matter of references to whether the Parliament of Canada had legislative jurisdiction to enact:

1. The Employment and Social Insurance Act, 1935.
4. The Natural Products Marketing Act, 1934 and 1935.
5. The Farmers' Creditors Arrangement Act, 1934 and 1935.
2. The Criminal Code, Section 498-A, 1935.
3. The Dominion Trade and Industry Commission Act, 1935.
6. The Weekly Rest in Industrial Undertakings Act, 1935;
The Minimum Wages Act, 1935; and
The Limitation of Hours of Work Act, 1935.

340991

25.8.37.

IN THE MATTER of a Reference as to whether the
Parliament of Canada had legislative jurisdiction
to enact The Employment and Social Insurance
Act, 1935. [*Section 498A of the Criminal Code etc. etc.*]

6 vol. in 1.

TEXTS of The Employment and Social
Insurance Act, and of the Judgments pro-
nounced by the Supreme Court of Canada
and by the Judicial Committee of His
Majesty's Privy Council.



IN THE MATTER of a Reference as to whether the
Parliament of Canada had legislative jurisdiction
to enact The Employment and Social Insurance
Act, 1935.

TEXTS of The Employment and Social
Insurance Act, and of the Judgments pro-
nounced by the Supreme Court of Canada
and by the Judicial Committee of His
Majesty's Privy Council.



OTTAWA
J. O. PATENAUDE, I.S.O.
PRINTER TO THE KING'S MOST EXCELLENT MAJESTY
1937

IN THE MATTER of a Reference as to whether the Parliament of
Canada had legislative jurisdiction to enact the Employment and
Social Insurance Act, 1935.

I N D E X

	PAGE
The Employment and Social Insurance Act.....	5
Judgment of the Supreme Court of Canada.....	42
Judgment of the Privy Council.....	77

STATUTES OF CANADA, 1935

CHAPTER 38.

An Act to establish an Employment and Social Insurance Commission, to provide for a National Employment Service, for Insurance against Unemployment, for aid to Unemployed Persons, and for other forms of Social Insurance and Security, and for purposes related thereto.

[Assented to 28th June, 1935.]

WHEREAS the Dominion of Canada was a signatory, as Preamble.
Part of the British Empire, to the Treaty of Peace made between the Allied and Associated Powers and Germany, signed at Versailles, on the 28th day of June, 1919; and whereas the said Treaty of Peace was confirmed by The Treaties of Peace Act 1919; and whereas, by Article 23 of the said Treaty, each of the signatories thereto agreed that they would endeavour to secure and maintain fair and humane conditions of labour for men, women and children, both in their own countries and in all countries to which their commercial and industrial relations extend, and by Article 427 of the said Treaty declared that the well-being, physical, moral and intellectual, of industrial wage-earners is of supreme international importance; and whereas it is desirable to discharge the obligations to Canadian Labour assumed under the provisions of the said Treaty; and whereas it is essential for the peace, order and good government of Canada to provide for a National Employment Service and Insurance against unemployment, and for other forms of Social Insurance and for the purpose of maintaining on equitable terms, interprovincial and international trade, and to authorize the creation of a National Fund out of which benefits to unemployed persons throughout Canada will be payable and to provide for levying contributions from employers and workers for the maintaining of the said Fund and for contributions thereto by the Dominion: Therefore His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

SHORT TITLE.

Short title. **1.** This Act may be cited as *The Employment and Social Insurance Act*.

INTERPRETATION.

- Definitions. **2.** (1) In this Act and in any regulation or order made thereunder unless the context otherwise requires,
- "Commission". (a) "Commission" means the Employment and Social Insurance Commission created by this Act;
- "Contribution" or "contributions". (b) "contribution" or "contributions," in relation to the number counted for the purposes of determining benefit rights and the duration of benefits of an insured contributor on an application for unemployment benefit, means full weekly contribution or contributions, as the case may be, after making allowance for the number of unemployed days for which contributions were paid in respect of him and in respect of which he is entitled to a refund of contributions paid by him by reason of having been unemployed during those days;
- "Day". (c) "day", means a period of twenty-four hours from twelve o'clock in the afternoon to the same hour of the next day or such other period of twenty-four hours as the Commission may for any general or special purpose prescribe;
- "Employment Service". (d) "employment service", includes employment offices organized and administered as provided by this Act;
- "Insurance year". (e) "insurance year", means such period of not less than fifty-two or more than fifty-three weeks as may be prescribed by regulation in that behalf;
- "Minister". (f) "Minister", means the Minister designated by the Governor in Council for the purposes of this Act;
- "Person". (g) "person" means a person of either sex;
- "Prescribed". (h) "prescribed", means prescribed by regulation of the Commission;
- "Regulation". (i) "regulation", means any regulation made in the manner prescribed by this Act;
- "Trade dispute". (j) "trade dispute", means any dispute between employers and employees, or between employees and employees, which is connected with the employment or non-employment, or the terms or conditions of employment of any persons, whether employees in the employment of the employer with whom the dispute arises, or not.
- Construction of certain expressions in this Act. (2) In this Act and in any regulation or order made thereunder, unless the context otherwise requires, each of the following expressions shall have the meaning assigned thereto in the provisions of this Act hereinafter in this subsection respectively mentioned:

- (a) "an insured contributor," subsection one of section twenty;
- (b) "benefit year," section twenty-four;
- (c) "calendar week," Second Schedule, Part II, paragraph ten;
- (d) "child," Third Schedule, Part II, paragraph six;
- (e) "continuously unemployed," subsection four of section twenty;
- (f) "continuous period of unemployment," subsection four of section twenty;
- (g) "employer's contribution," subsection three of section seventeen;
- (h) "employed persons," subsection one of section fifteen;
- (i) "insurable employment," subsection one of section fifteen;
- (j) "statutory conditions," section nineteen and subsection one of section twenty;
- (k) "unemployment benefit," section nineteen;
- (l) "unemployment books," subsection two of section eighteen;
- (m) "unemployment cards," subsection two of section eighteen;
- (n) "Unemployment Insurance Advisory Committee," section thirty-six;
- (o) "Unemployment Insurance Fund," subsection one of section seventeen and subsection one of section thirty-five;
- (p) "unemployment insurance stamps," subsection two of section eighteen.

3. The remainder of this Act may be referred to as follows:— Division
into Parts.

PART I, sections four to nine inclusive, relating to the Employment and Social Insurance Commission;

PART II, sections ten to fourteen inclusive, relating to Employment Service;

PART III, sections fifteen to thirty-eight inclusive, relating to Unemployment Insurance;

PART IV, sections thirty-nine to forty-one inclusive, relating to National Health;

PART V, sections forty-two to forty-eight inclusive, General.

PART I.

EMPLOYMENT AND SOCIAL INSURANCE COMMISSION

4. (1) This Act shall be administered by a Commission to be called "The Employment and Social Insurance Com- Commission.

mission," which shall consist of a Chief Commissioner and two other Commissioners appointed by the Governor in Council.

How chosen. (2) Of the said Commissioners, other than the Chief Commissioner, one shall be appointed after consultation with organizations representative of workers and the other after consultation with organizations representative of employers.

Quorum: (3) Two Commissioners shall be a quorum and no
vacancy. vacancy in the Commission shall impair the right of the remaining Commissioners to act.

Decision of (4) The decision of the majority of the Commissioners
majority. present at any meeting shall be the decision of the Commission, and in the event of a tie the Chief Commissioner shall have a second or casting vote.

Casting
vote. (5) The Commission shall be a body corporate having
Body
corporate. capacity to contract and to sue and be sued in the name of the Commission.

Power to (6) The Commission shall have power, for the purposes
hold pro- of this Act, to acquire, hold and dispose of personal property,
perty. and with the approval of the Governor in Council, real property.

Head Office. (7) The head office of the Commission shall be in the city of Ottawa in the Dominion of Canada.

Duration of 5. (1) Each Commissioner shall, subject to his earlier
office. removal for cause or permanent incapacity hold office for a period of ten years from the date of his appointment, but his office shall become vacant upon his attaining the age of seventy years.

Eligible for (2) A Commissioner upon expiration of his term of
reappoint- office, if under seventy years of age, shall be eligible for
ment. reappointment.

Absence or (3) In the event of absence or temporary incapacity of
incapacity. any Commissioner the Governor in Council may appoint a person to act in his stead during such absence or incapacity.

Vacancy. (4) Any vacancy arising in the Commission shall be filled within a period of four months.

Salaries of 6. The Chief Commissioner and the other members of
Commis- the Commission shall be paid such salaries as may from
sioners. time to time be fixed by the Governor in Council, and they shall devote their whole time to the performance of the duties of their respective offices, and reside in the city of Ottawa or within ten miles thereof.

Commission 7. (1) In addition to the powers and duties of the Com-
to undertake mission as otherwise provided by this Act, the Commis-
investiga- sion shall, as soon as practicable after appointment, under-
tions. take investigations for the purpose of making proposals to the Governor in Council for—

- (a) providing unemployment insurance for the employments excepted from the operation of Part III of this Act, or for any of them, either by extending thereto the provisions of that Part, with such modifications, if any, as may be found necessary, or by special or supplementary schemes; Extension of insurance to excepted employments.
- (b) making provision for the assistance, during unemployment, of persons Assistance for unemployed.
- (i) ordinarily employed in any of the employments excepted from the operation of Part III of this Act; or
- (ii) ordinarily employed in insurable employment but who for the time being are not entitled to unemployment insurance benefit under this Act; and
- (c) providing, in co-operation with educational authorities and institutions, or otherwise, either generally or in certain areas or for any class or classes of such persons— Training of unemployed.
- (i) physical and industrial training with a view to maintaining or increasing their industrial fitness, skill and efficiency, or enlarging their knowledge of the industry in which they normally seek employment; or
- (ii) training and instruction in some occupation, trade or handicraft; or
- (iii) employment in any work, having regard for their capacity, training and experience, with a view to re-habilitating them for regular employment.
- (2) Proposals concerning assistance within the meaning of paragraph (b) of subsection one of this section may include proposals for the establishment of savings or any other funds derived either wholly out of contributions made by such persons or any of them while in employment or partly out of contributions so made and partly out of contributions made by the employers of such persons, or any other plan of assistance. Schemes of assistance.
- (3) The Commission shall from time to time report to the Governor in Council their conclusions and recommendations based on any investigation made as hereinbefore in this section provided, and if any such report includes recommendations for the establishment of any fund under paragraph (b) of subsection one of this section, the recommendations shall be made on the basis that any such fund shall be maintained wholly distinct and separate from any other funds. Report to Governor in Council.
- (4) The Unemployment Insurance Advisory Committee, established under Part III of this Act, shall report to the Governor in Council on any recommendations made by the Commission in respect of the matters specified in paragraphs (a) and (b) of subsection one of this section. Report by Advisory Committee on recommendation of Commission.

Officers and employees to be appointed under Civil Service Act.

8. (1) The Commission may, subject to the approval of the Governor in Council, employ such officers, clerks and employees for the purposes of this Act as the Commission may determine, and all appointments of officers, clerks and employees so employed by the Commission shall be made in pursuance of the *Civil Service Act*.

Technical and professional employees for special purposes.

(2) For the purposes of any investigation, or for any other purpose of this Act, the Commission may, subject to the approval of the Governor in Council, from time to time temporarily employ such persons of technical and professional attainments as the Commission may deem necessary.

Cost of administration to be provided by Parliament.

(3) The costs of administration of this Act, including remuneration of Commissioners, officers, clerks and employees, shall be paid out of moneys provided by Parliament.

Power of Commission under Inquiries Act.

9. (1) For the purposes of any investigations undertaken by the Commission under the provisions of this Act, the Commission shall have the powers of a Commissioner under the *Inquiries Act*.

Notice of investigation.

(2) The Commission shall give such public notice as they consider sufficient of their intention to investigate any matters which under this Act they are empowered to investigate, and they shall receive any representations submitted to them by persons or associations of persons appearing to the Commission to have an interest in the matters under investigation.

PART II.

EMPLOYMENT SERVICE.

Organization of Employment Service.

10. The Commission shall organize an employment service for the Dominion of Canada, in manner hereinafter provided, and shall be responsible for the constitution and management of such employment service and the direction, maintenance and control of all employment offices established as hereinafter provided.

Regional divisions: Central Offices.

11. (1) The Commission shall establish such regional divisions as they may deem expedient and desirable, and there shall be a central office in each such division at such place as the Commission may determine, and all employment offices provided for under the next succeeding subsection of this section which are within any such division shall be directed and controlled by the Commission through the central office of that division.

Employment offices.

(2) The Commission shall establish employment offices within each regional division at such places as they may deem expedient and desirable for the purposes of this Act.

(3)

(3) The central office within each regional division shall be a clearing house for collecting from and distributing to the employment offices therein information concerning employers seeking workers and workers seeking employment.

Central office clearing house.

(4) The Commission shall co-ordinate the services of the central offices so that the information obtained in any regional division may be available to workers and employers in other regional divisions.

Co-ordination of central offices.

12. (1) The Commission shall collect information concerning employers requiring workers and workers seeking employment and to the extent the Commission considers necessary shall make the same available at the employment offices.

Collection of information.

(2) The Commission may request any person to make written returns of such information as the Commission may deem necessary for the purposes of this Act, and failure to comply with any such request shall be an offence against this Act and shall on summary conviction render liable any person in default to a fine not exceeding fifty dollars or to imprisonment for a period not exceeding one month, or to both fine and imprisonment.

Failure to make returns an offence.

13. (1) The Commission may for any central office or for any employment office, establish a local committee for the purpose of advising and otherwise assisting the Commission.

Local committees.

(2) Each such committee shall include members chosen after consultation with local organizations representative of workers and an equal number after consultation with employers.

How chosen.

14. (1) The Commission may make regulations authorizing advances by way of loan towards meeting the expenses of workers travelling to places where employment has been found for them through an employment office.

Advances to workers seeking employment.

(2) Any sum advanced in accordance with such regulations shall be a debt due by the worker to the Commission and recoverable by process of law.

Recovery of loans.

(3) All advances made in accordance with regulations made under this section shall be made out of moneys provided by Parliament for that purpose, and all repayments of such advances shall be paid into the Consolidated Revenue Fund of Canada.

Moneys provided by Parliament.

PART III.

UNEMPLOYMENT INSURANCE

Insured Persons

Persons to be insured against unemployment "employed persons" defined.

15. (1) Subject to the provisions of this Act, all persons of the age of sixteen years and upwards who are engaged in any of the employments specified in Part I of the First Schedule to this Act, not being employments specified as excepted employments in Part II of that Schedule (in this Act referred to as "employed persons"), shall be insured against unemployment in manner provided by this Act, and the employment in which any such person is engaged shall in this Act be referred to as "insurable employment."

Power to enlarge or restrict excepted employments.

(2) Where it appears to the Commission that the terms and conditions of service of, and the nature of the work performed by, any class of persons employed in an excepted employment are so similar to the terms and conditions of service of, and the nature of the work performed by, a class of persons employed in an insurable employment as to result in anomalies in the operation of this Act, the Commission may, by regulations either unconditionally or subject to such conditions as may be specified in the regulations, either:—

(a) provide for including the class of persons employed in insurable employment among the classes of persons employed in excepted employment; or

(b) provide for including the class of persons employed in excepted employment among the classes of persons employed in insurable employment.

Persons in insurable employment to an inconsiderable extent.

(3) The Commission may by regulations provide, subject to such exceptions and conditions as the Commission think fit, for adding any class of employment to the excepted employments but only as respects persons who are in any week employed in that class of employment to such extent (being in the opinion of the Commission inconsiderable) as may be specified in the regulations.

Exemptions.

16. (1) Where any employed person proves that he is either:—

Persons entitled to certificates of exemption.

(a) a person who is employed in an occupation which is seasonal and does not ordinarily extend over more than twenty-four weeks in any year and who is not ordinarily employed in any other occupation which is insurable employment; or

(b) a person who habitually works for less than the ordinary working day;

Certificate of exemption.

he shall be entitled to a certificate exempting him from liability to contribute under this Act and while holding such certificate shall not be insured under this Act.

(2) All claims for exemption shall be made to the Commission in the prescribed form and certificates of exemption shall be granted only by the Commission.

Certificate by
Commission.

Contributions.

17. (1) The funds required for providing unemployment benefit and for making any other payments which under this Act are to be made out of the Unemployment Insurance Fund, established under this Part of this Act, shall be derived partly from moneys provided by Parliament, partly from contributions by employed persons and partly from contributions by the employers of those persons, which contributions shall be paid by means of revenue stamps as hereinafter provided, or otherwise as may be prescribed by the Commission.

Contributions
by employed
persons and
employers.

(2) Subject to the provisions of this Act, every employed person and every employer of any such person shall be liable to pay contributions in accordance with the provisions of the Second schedule to this Act.

Rates of
contribution.

(3) Except where regulations under this Act otherwise prescribe, the employer shall in the first instance be liable to pay both the contribution payable by himself (in this Act referred to as "the employer's contribution") and also, on behalf of the employed person, the contribution payable by that person, and subject to any such regulations shall be entitled to recover from the employed person, by deduction from his wages or otherwise, the amount of the contributions so paid by him on behalf of the employed person.

Employer
liable for both
contributions
but may
recover from
employee.

(4) The employer of a person who holds a certificate of exemption under this Act shall be liable to pay the like contributions as would be payable by him as employer's contributions if that person were a person insured under this Act, and in this Act any reference to the employer's contribution shall be construed as including a contribution payable under this subsection.

Employer's
contribution
payable in
respect of
exempted
person.

(5) The regulations made under this Act shall provide for the return to a person and to his employer of any contributions paid by them or either of them within the prescribed period under the erroneous belief that the contributions were payable in respect of that person, subject, in the case of that person's contributions, to the deduction of any amount received by him in respect of unemployment benefit to which he was erroneously deemed to be entitled by reason of the contributions so paid in respect of him: Provided that no return of contributions shall be made under this provision except on an application made in the prescribed manner and within the prescribed period, not being less than one year from the date on which the contributions were paid.

Return of
contributions
paid in error.

Payment and recovery of contributions subject to rules.

(6) The payment of contributions and the recovery of contributions paid by employers on behalf of employed persons shall be subject to the rules in Part II of the Second Schedule to this Act.

Payment by stamps or otherwise.

18. (1) The Governor in Council may by regulation provide for the payment of contributions by means of revenue stamps (in this Act referred to as "unemployment insurance stamps") affixed to or impressed upon books or cards (in this Act respectively referred to as "unemployment books" and "unemployment cards"), and such stamps and the devices for impressing the same shall be prepared and issued in such manner as may be prescribed by such regulation.

Power to make regulations as to payment of contributions.

(2) Subject to the provisions of this Part, the Commission may make regulations providing for any matters relating to the payment and collection of contributions payable under this Act, and in particular for—

- (a) regulating the manner, times and conditions in, at and under which payments are to be made;
- (b) the entry in or upon unemployment books or cards of particulars of contributions and benefits paid in respect of the persons to whom the unemployment books or cards relate;
- (c) the issue, sale, custody, production and delivery up of unemployment books or cards and the replacement of unemployment books or cards which have been lost, destroyed or defaced; and
- (d) the offering of reward for the return of an unemployment book or card which has been lost and for the recovery from the person responsible for the custody of the book or card at the time of its loss of any reward paid for the return thereof.

Unemployment Benefit.

Right of insured person to unemployment benefit.

19. Every person who being insured under this Act is unemployed and in whose case the conditions laid down by this Act (in this Act referred to as "statutory conditions") are fulfilled, shall be entitled, subject to the provisions of this Act (including Part II of the Third Schedule thereof) to receive payments (in this Act referred to as "unemployment benefit") at weekly or other prescribed intervals at such rates as are authorized by or under Part I of the Third Schedule to this Act, so long as the statutory conditions continue to be fulfilled and so long as he is not disqualified under this Act for the receipt of unemployment benefit.

20. (1) Subject to the provisions hereinafter contained, the statutory conditions for receipt of unemployment benefit by a person insured under this Act (in this Act referred to as "an insured contributor") are—

Statutory conditions for receipt of unemployment benefit.

(i) that contributions for not less than forty full weeks (exclusive of any days of unemployment for which, pursuant to the provisions of the Second Schedule to this Act, he is entitled to a refund of contributions paid by him) have been paid in respect of him while employed in insurable employment during a period not exceeding two years immediately preceding the date on which a claim for benefit is made;

(ii) that he has made application for unemployment benefit in the prescribed manner, and proves that since the date of the application he has been continuously unemployed; and

(iii) that he is capable of and available for work but unable to obtain suitable employment.

(2) In determining whether an insured contributor has proved that the first statutory condition is fulfilled in his case, no account shall be taken of any contributions paid in respect of him for any period during which he was not *bonâ fide* employed in insurable employment, nor for any period during which he was exempt from the provisions of this Act.

Account taken only of contributions when *bonâ fide* employed.

(3) If an insured contributor proves in the prescribed manner that he was during any period, falling within the two years specified in the first statutory condition, incapacitated for work by reason of some specific disease or bodily or mental disablement, or employed in any of the employments specified in Part II of the First Schedule to this Act, or engaged in business on his own account, the first statutory condition shall have effect as if for the said period of two years there were substituted a period of two years increased by the said periods of incapacity or of such employment or business engagement as aforesaid, but so as not to exceed in any case four years.

Enlargement of first statutory condition.

(4) Any three days of unemployment, whether consecutive or not, within a period of six consecutive days shall be treated as a continuous period of unemployment, and any two such continuous periods separated by a period of not more than six weeks shall be treated as one continuous period of unemployment, and the expressions "continuously unemployed" and "continuous period of unemployment" shall be construed accordingly.

Meaning of continuous period of unemployment.

(5) Any period during which a person

(i) fails to fulfil the second or third statutory condition, or

(ii) is, under the provisions of this Act, disqualified for receiving benefit, or

Period of disqualification not to count in continuous period of unemployment unless due to disease or disablement.

(iii) is, under the provisions of this Act, deemed not to be unemployed,

shall be excluded in the computation of continuous periods of unemployment unless that person proves that the failure to fulfil the said statutory conditions or the disqualification for receiving benefit was due to incapacity for work arising from some definite disease or bodily or mental disablement.

Continuous unemployment to begin on date of application.
Proviso.

(6) A continuous period of unemployment shall be deemed to begin on the date on which the insured contributor makes application for benefit in the prescribed manner: Provided that regulations may be made authorizing some earlier date to be substituted for the date of application

(i) where good cause is shown for delay in making application; or

(ii) for the purpose of computing the first week of a continuous period of unemployment in a case in which the applicant, upon a claim for benefit which begins his benefit year, proves in the prescribed manner that a continuous period of unemployment was in fact current at the date of that application.

Employment which is unsuitable within the third statutory condition.

(7) An insured contributor shall not be deemed to have failed to fulfil the third statutory condition by reason only that he has declined—

Unemployment due to trade dispute.

(a) an offer of employment arising in consequence of a stoppage of work due to a trade dispute; or

Employment at low wages or on unfavourable conditions.

(b) an offer of employment at wages lower, or on conditions less favourable, than those which he might reasonably have expected to obtain, having regard to those which he habitually obtained in his usual occupation, or would have obtained had he continued to be so employed; or

Employment less favourable than observed by agreements between employers and employees.

(c) an offer of employment in his usual occupation at wages lower, or on conditions less favourable, than those observed by agreement between employers and employees, or failing any such agreement, than those recognized by reasonable and fair employers;

Proviso.

Provided that after the lapse of such an interval from the date on which an insured contributor becomes unemployed as, in the circumstances of the case, is reasonable, employment shall not be deemed to be unsuitable by reason only that it is employment of a kind other than employment in the usual occupation of the insured contributor, if it is employment at wages not lower and on conditions not less favourable than those observed by agreement between employees and employers or, failing any such agreement, than those recognized by reasonable and fair employers, but no insured contributor shall be disqualified for receipt of benefit by reason only of his refusal to accept

employment if by acceptance thereof he would lose the right—

- (i) to become a member of, or
- (ii) to continue to be a member and to observe the lawful rules of, or
- (iii) to refrain from becoming a member of,

any association, organization or union of workers.

(8) Notwithstanding that the employment of an insured contributor has terminated, he shall not be deemed to be unemployed—

- (a) during any period for which he continues to receive wages by way of compensation for loss of, and substantially equivalent to, the remuneration he would have received if his employment had not terminated, or,

- (b) on any day on which he is following an occupation from which he derives any remuneration or profit, unless that occupation could ordinarily be followed by him in addition to his usual employment and outside the ordinary working hours of that employment, and the remuneration or profit received therefrom for that day does not exceed one dollar, or where the remuneration or profit is payable or is earned in respect of a period longer than a day, the remuneration or profit does not on the daily average exceed that amount,

nor shall an insured contributor be deemed to be unemployed

- (i) on any day which is recognized as a holiday for his grade or class or shift in the occupation or at the factory, workshop or other premises at which he is employed, or

- (ii) on any day of any calendar week during which he works for the number of days or the number of shifts which constitutes the full week's work for his grade or class or shift in the occupation or at the factory, workshop or other premises of his employment.

Right to membership in organizations of workers preserved.

Periods not counted in computing unemployment.

While in receipt of compensation substantially equivalent to wages lost.

While following any occupation for remuneration unless outside ordinary working hours.

Holidays.

In excess of number of shifts for week.

21. An insured contributor shall be disqualified for receiving unemployment benefit—

- (a) if he has lost his employment by reason of a stoppage of work, which was due to a trade dispute at the factory, workshop or other premises at which he was employed, except where he has, during a stoppage of work, become *bonâ fide* employed elsewhere in the occupation which he usually follows, or has become regularly engaged in some other occupation, but this disqualification shall last only so long as the stoppage of work continues, and shall not apply in any case in which the insured contributor proves

- (i) that he is not participating in, or financing or directly interested in the trade dispute which caused the stoppage of work, and

Disqualifications for unemployment benefit.

Loss of work due to trade dispute.

(ii) that he does not belong to a grade or class of workers of which immediately before the commencement of the stoppage there were members employed at the premises at which the stoppage is taking place any of whom are participating in or financing or directly interested in the dispute,

and where separate branches of work which are commonly carried on as separate businesses in separate premises are carried on in separate departments on the same premises, each of those departments shall, for the purposes of this provision, be deemed to be a separate factory or workshop or separate premises as the case may be; or

(b) if on a claim for benefit it is proved by an officer of the commission that the claimant—

(i) after a situation in any employment which is suitable in his case has been notified to him by an employment office or other recognized agency, or by or on behalf of an employer as vacant or about to become vacant, has without good cause refused or failed to apply for such situation, or refused to accept such situation when offered to him, or

(ii) has neglected to avail himself of an opportunity of suitable employment, or

(iii) has without good cause refused or failed to carry out any written direction given to him by an officer of the employment office with a view to assisting him to find suitable employment (being directions which were reasonable having regard both to the circumstances of the claimant and to the means of obtaining that employment usually adopted in the district in which the claimant resides); or

(c) if he has been discharged from his employment by reason of his own misconduct or if he voluntarily leaves his employment without just cause; or

(d) while he is an inmate of any prison or an institution supported wholly or partly out of public funds, or, subject to the provisions of this Act, while he is a resident, whether temporarily or permanently, out of Canada; or

(e) while he is in receipt of an old age pension under an Old Age Pensions Act.

Disqualification on proof by an officer of the Commission of neglect by insured contributor to avail himself of opportunity for work.

Loss of work due to misconduct.

While an inmate of public institution.

While in receipt of old age pension.

Period of disallowance of benefit in certain cases.

22. Where a claim for benefit by an insured contributor is disallowed by the court of referees or the umpire, on the ground

(a) that the third statutory condition is not fulfilled in his case; or

(b) that he is disqualified under paragraph (b) or (c) of the next preceding section of this Act for receiving benefit, the court of referees or the umpire shall declare the insured

contributor to be disentitled to benefit for a period not exceeding six weeks beginning from such date as may be determined by the court of referees or the umpire as the case may be.

23. (1) An insured contributor shall, if the statutory conditions are fulfilled in his case, and if he is not disqualified under this Act, be entitled to receive in a benefit year, benefit

(a) for periods not exceeding in the aggregate seventy-eight days of continuous unemployment, and

(b) for additional days of which the maximum number shall be computed in manner provided by the next succeeding subsection.

(2) An insured contributor in respect of whom not less than one hundred contributions have been paid during the complete insurance years, not exceeding five, last preceding the benefit year for which the computation of additional days is made shall be qualified for additional days determined as of the beginning of such benefit year equal to one day for every contribution paid in respect of him as an insured contributor for the insurance years aforesaid, less one day for every three days for which benefit has been paid to him for his benefit years, if any, which ended in the period, not exceeding five years, immediately preceding his benefit year for which the computation is made:

Provided that for the purposes of this subsection,

(i) fractions of a day shall be disregarded,

(ii) every two contributions paid in respect of an insured contributor under the age of eighteen years shall be reckoned as one contribution, and

(iii) the number of additional days so computed shall not in any case be deemed to continue the benefit rights of the insured contributor beyond the end of his benefit year.

(3) An insured contributor who has in any benefit year exhausted his benefit rights shall not thereafter be entitled to benefit for any day in that benefit year, nor shall he become entitled to benefit in his next benefit year before the Monday next after the end of the calendar week for which there is paid in respect of him the last of the thirteen contributions specified in paragraph (b) of the next succeeding section.

(4) In calculating contributions for the purposes of the two next preceding subsections of this section, no account shall be taken of any contributions paid in respect of any insured contributor for any period during which he was not *bonâ fide* employed in insurable employment, nor for any period during which he was exempted under the provisions of section sixteen of this Act.

Duration of benefit.

Ordinary benefit days.

Additional days.

Computation of additional days.

Proviso.

Benefit not to extend beyond benefit year.

Only periods of *bonâ fide* employment to count in computing benefits.

Adjustment
of benefits on
account of
contributions
or benefits
paid in error.

(5) The Commission may prescribe by regulations the circumstances in which and the extent to which contributions paid in error and sums paid to a person by way of benefit while he was not entitled thereto are to be taken into account for the purposes of this and the next succeeding section.

Proof of first
statutory
condition at
beginning of
benefit
year only.

(6) After an insured contributor has at the beginning of his benefit year proved that the first statutory condition is fulfilled in his case, then, subject to and in accordance with regulations made by the Commission, he shall be treated throughout the remainder of that benefit year as if that condition continued to be so fulfilled.

Definition of
benefit
year.

24. For all the purposes of this Act, the expression "benefit year" shall mean, in relation to an insured contributor, the period of twelve months beginning on the date on which, on an application for benefit, he proves for the first time

(a) that the first statutory condition is fulfilled in his case; and

(b) also, in the case only of an insured contributor who has exhausted his benefit rights in his last preceding benefit year, that thirteen contributions have been paid in respect of him since the Sunday last before the last day for which he received benefit;

and every subsequent period of twelve months commencing on the date on which that contributor on a claim for benefit proves the matters aforesaid for the first time after the termination of his last preceding benefit year.

Error in
benefit year:
rectification.

(2) If it is found that any insured contributor has been treated as having begun his benefit year on any date by reason of his having been wrongly treated as having proved any of the matters aforesaid on that date, his benefit year shall nevertheless be deemed to have begun on that date, but he shall not be entitled to benefit during the remainder of that benefit year until he proves the matters aforesaid.

Special
classes of
insured
persons.
Casual
workers.

Seasonal
workers.

Intermittent
workers.

Married
women.

25. (1) This section applies to certain special classes of insured contributors, being

(a) persons who habitually work for less than a full week;

(b) persons whose normal employment is for portions of the year only in occupations which are seasonal;

(c) persons whose normal employment is in an occupation in which their services are not normally required for the full week or who owing to personal circumstances are not normally employed for the full week;

(d) married women who, since marriage or in any prescribed period subsequent to marriage, have had less

than the prescribed number of contributions paid in respect of them; and

- (e) persons who by custom of their occupation, trade or industry or pursuant to their agreement with an employer are paid, in whole or in part, by the piece or on a basis other than that of time.

(2) Where it appears to the Commission that the application of the provisions of this Act in the determination of benefits for any of the said classes would result in anomalies, having regard for the benefits of other classes of insured contributors, the Commission may from time to time make regulations which shall, in relation to the classes of persons to whom this section applies, impose such additional conditions and terms with respect to contributions and the payment thereof and with respect to the receipt of benefit and such restrictions on the amount and period of benefit and on the number of days of any period of continuous unemployment to be excluded from the benefit period, and make such modifications in the provisions of this Act relating to the determination of claims for benefit and the meaning of "continuous period of unemployment", as may appear necessary to remove or substantially remove the anomalies.

Power to make regulations in respect of special classes.

(3) The Commission shall give such public notice as they consider sufficient of their intention to make regulations under this section and shall receive any representations which may be made to them with respect thereto.

Notice of intention to make regulations.

(4) Regulations made in pursuance of this section may apply either generally to all the persons specified in subsection one of this section or to any class of those persons or to any portion of such a class, or with respect to them or any of them, in any specified area.

Regulations may apply generally or otherwise.

26. Subject to the provisions of this Act, every assignment of, or charge on, and every agreement to assign or charge, any of the benefits conferred by this Act, shall be void, and, on an assignment for the benefit of creditors being made by any person entitled to any such benefit, the benefit shall not pass to any trustee or other person acting on behalf of his creditors.

Benefits inalienable.

Determination of Questions.

27. (1) If any question arises—

- (a) as to whether any employment or any class of employment is or will be such employment as to make the person engaged therein an employed person within the meaning of this Act or whether a person is or was an employed person within the meaning of this Act; or

Determination of questions by Commission concerning the rights of persons and appeals to the Exchequer Court.

- (b) whether a person or class of persons is or is not, or was or was not, a person or class of persons to whom a special or supplementary scheme under this Act applies or applied; or
- (c) as to who is or was the employer of any employed person; or
- (d) as to the rate of contribution payable under or in pursuance of this Act by or in respect of any person or class of persons or as to the rates of contribution payable in respect of any employed person by the employer and that person respectively; or
- (e) whether a person was or was not employed in any excepted employment during any period falling within the period of two years specified in the first statutory condition;

the question shall be decided by the Commission.

Regard to
nature of
work of
employed
person.

(2) In determining any question as to whether any occupation, in which a person is or has been engaged, is or was such as to make him an employed person within the meaning of this Act, regard shall be had to the nature of the work on which he is or was engaged rather than to the business of the person by whom he is or was employed.

Commission
may revise
decision.

(3) The Commission may, on new facts being brought to their notice, revise any decision given under this section.

Regulations
governing
procedure.

(4) The Governor in Council may make regulations prescribing the procedure under this section.

Insurance Officer: Referee: Umpire.

Insurance
officers.

28. (1) The Commission may in each regional division established under section eleven of this Act employ such number of persons as the Governor in Council may approve, to be insurance officers for such division.

Chairmen of
court of
referees.

(2) The Governor in Council may, in each such regional division designate such number of persons as are deemed necessary to be chairmen of courts of referees in each such division.

Umpires,
and deputy-
umpires.

(3) The Governor in Council may, from amongst the Judges of the Exchequer Court of Canada and of the Superior Courts of the provinces of Canada, designate an umpire and such number of deputy-umpires as the Governor in Council may deem necessary for the purposes of this Act, and, subject to the provisions of this Act, may prescribe their jurisdiction; and unless the context otherwise requires, any reference to the umpire shall include a reference to a deputy-umpire.

Court of
referees.

29. (1) A court of referees for the purposes of this Act shall consist of one or more members chosen to represent

employers, with an equal number of members chosen to represent insured contributors, and a chairman appointed as provided in the next preceding section of this Act.

(2) Panels of persons chosen to represent employers and insured contributors respectively shall be constituted by the Commission for such districts and such trades or groups of trades as the Commission may think fit, and the members of a court of referees to be chosen to represent employers and insured contributors shall be selected from those panels in the prescribed manner.

Panels of members of courts of referees.

(3) Subject as aforesaid, the constitution of courts of referees shall be determined by regulations under this Act.

Subject to regulations.

(4) Regulations under this Act may provide that any claim or question which is reported or referred to a court of referees may, with the consent of the claimant or the person or association in whose case the question arises, but not otherwise, be proceeded with in the absence of any member or members of the court other than the chairman, and in any such case the court shall, notwithstanding anything in this Act, be deemed to be properly constituted, and the chairman shall, if the number of the members of the court is an even number, have a second or casting vote.

Court may not proceed if chairman absent.

(5) The Commission may pay such remuneration to the chairman and other members of a court of referees, and such travelling and other allowances to any such chairman or members or to any persons required to attend before any such court, and such other expenses in connection with any court of referees as the Commission determines, and any such payments shall be treated as costs of administration of this Act.

Remuneration of chairman and members; expenses of persons required to attend.

Claim Procedure.

30. (1) All claims for benefit, and all questions arising in connection with such claims, shall be submitted forthwith for examination to one of the insurance officers.

Examination and determination of claims.

(2) The insurance officer shall forthwith take into consideration any claim submitted to him for examination under this section, and if he is of opinion that the claim ought to be allowed, he may himself allow the claim.

Insurance officer may allow claim.

(3) If the insurance officer is not satisfied that a claim ought to be allowed he may either refer the claim (so far as practicable within fourteen days from the date on which the claim was submitted to him for examination) to the court of referees for their decision or, subject to the provisions of this subsection, himself disallow the claim. Provided that

Insurance officer may disallow claim or refer to court of referees.

(a) the insurance officer shall not himself disallow a claim on any of the following grounds, namely—

(i) that the third statutory condition is not fulfilled; or

(ii) that the claimant is disqualified by reason of his having been discharged from his employment by reason of his own misconduct or having voluntarily left his employment without just cause, or by reason of the provisions of paragraph (b) of section twenty-one of this Act; or

(iii) that the claimant does not fulfil one or more of the additional conditions or terms for the receipt of benefit imposed by regulations made under this Act, or is subject to restrictions on the amount or period of benefit imposed by such regulations; and

(b) the insurance officer shall refer to the court of referees any question whether the claimant is liable to have deductions made under any of the provisions of this Act from any benefit to which he is, or may become, entitled.

Appeals of
claimant to
court of
referees.

(4) Where a claim is disallowed by the insurance officer, the claimant may at any time within twenty-one days of the date on which the decision of the insurance officer is communicated to him, or within such further time as the Commission may in any particular case for special reasons allow, appeal in the prescribed manner to the court of referees.

Appeal to
umpire.

(5) Subject as hereinafter provided, an appeal shall lie to the umpire from any decision of a court of referees as follows:

(a) At the instance of an insurance officer, in any case;

(b) at the instance of an association of employed persons of which the claimant is a member, in any case;

(c) at the instance of the claimant

(i) without leave in any case in which the decision of the court of referees is not unanimous; and

(ii) with the leave of the chairman of the court of referees in any other case; so however, that where leave to appeal is not granted when the decision of the court of referees is given, an application for such leave may be made by the claimant in such form, and within such time after the date of the decision, as may be prescribed by regulations made by the Commission under this Act, and any application for leave to appeal shall be granted by the chairman if it appears to him that there is a principle of importance involved in the case or any other special circumstance by reason of which leave to appeal ought to be given.

Findings of
a court of
referees in
writing.

(6) A court of referees shall record their decisions in writing and shall include in the record of every decision a statement of their findings on questions of fact material to the decision.

(7) Where the chairman of a court of referees grants leave to appeal to the umpire from the decision of the court, the chairman shall record in writing a statement of the grounds on which leave to appeal is granted.

Chairman to record grounds for granting appeal to umpire.

(8) An appeal under subsection five of this section must be brought within six months of the date of the decision of the court of referees or such longer period as the umpire may in any case for special reasons allow.

Appeal within six months.

(9) For the purposes of paragraph (b) of subsection five of this section, a claimant for benefit shall not, in relation to any appeal, be deemed to be a member of any association of employed persons unless he was a member thereof on the last date on which he was employed before the claim subject to the appeal was made, and has continued to be a member thereof until the date when the appeal is made, and no such association shall be deemed to be an association of employed persons for the purposes of this section unless an important and declared part of its functions is the furtherance of the interests of its members in relation to their employment and unemployment, and the question whether any association is or is not an association of employed persons for the purpose of this section shall be for the decision of the umpire.

Associations which may appeal on behalf of a claimant member.

(10) The decision of the umpire on any appeal from the court of referees shall be final.

Decisions of umpire final.

(11) If on an appeal to the umpire from a decision of a court of referees any person affected by the decision is requested by the umpire to attend before him on the consideration of the appeal and so attends, he shall be paid out of moneys provided by Parliament for meeting the costs of administration of this Act such travelling and other allowances, including compensation for loss of remunerative time, as the Commission may determine.

Expenses of persons required to attend appeal.

(12) An insurance officer, a court of referees or the umpire, on new facts being brought to his or their knowledge, may revise a decision given in any particular case, and where any such revision is made, the revised decision shall have effect as if it had been an original decision, and the foregoing provisions of this section shall apply accordingly.

Insurance officer, court of referees, or umpire may revise a decision given.

(13) Where a claim for benefit is allowed by a court of referees, benefit shall be payable in accordance with the decision of the court of referees notwithstanding that an appeal to the umpire is pending, unless the appeal has been brought on the ground that the claimant ought to be disqualified under the provisions of paragraph (a) of section twenty-one of this Act and within twenty-one days of the date on which the decision of the court of referees was given, and any benefit paid in pursuance of the provisions of this subsection shall be treated, notwithstanding that

Decision of court of referees to have effect pending appeal to umpire: exception.

the final determination of the question is adverse to the claim, as having been duly paid and shall not be recoverable from the insured contributor.

References to
claims for
benefit:
construction.

(14) In this section references to claims for benefit shall be construed as including references to questions arising in relation to such claims, and references to allowing or disallowing a claim shall be construed as including references to determining a question in favour of or adversely to a claimant.

Legal Proceedings

Penalty for
obtaining
benefit or
avoiding any
payment
through mis-
representa-
tion.

31. (1) If for the purpose of obtaining any benefit or payment under this Part of this Act, either for himself or for any other person, or for the purpose of avoiding any payment to be made by himself under this Part of this Act, or enabling any other person to avoid any such payment, any person knowingly makes any false statement or false representation, he shall be guilty of an offence against this Act and liable on summary conviction to imprisonment for a term not exceeding three months, with or without hard labour.

Penalty for
failure to pay
contributions
or for
contravention
of Act or re-
gulations.

(2) If any employer or employed person has failed or neglected to pay any contributions which he is liable under this Part of this Act to pay, or if any employer or employed person or any other person is guilty of any contravention of or non-compliance with any of the requirements of this Part of this Act or the regulations made thereunder in respect of which no penalty is provided, or if any employer deducts or attempts to deduct from the wages or other remuneration of an employed person the whole or any part of the employer's contribution, he shall be guilty of an offence against this Act and for each offence, be liable on summary conviction, to a fine not exceeding fifty dollars, or to imprisonment for a period not exceeding three months, or to both fine and imprisonment.

Penalty for
sale or
improper
use of un-
employment
books, cards,
stamps, etc.

(3) Every person who buys, sells, or offers for sale, takes or gives in exchange or pawns or takes in pawn, any unemployment card, unemployment book, or used unemployment insurance stamp, or any document or thing used in the administration of this Part of this Act, shall be guilty of an offence against this Act and for each offence be liable on summary conviction to a fine not exceeding fifty dollars or to imprisonment for a term not exceeding three months, or to both fine and imprisonment.

Power to
take and
conduct
proceedings.

32. (1) Proceedings for an offence under this Part of this Act shall not be instituted except by or with the consent in writing of the Commission or by an inspector or other officer appointed under this Act and authorized in that behalf by special or general directions of the Commission.

(2) Proceedings for an offence under this Part of this Act may be commenced at any time within three months from the date on which evidence, sufficient in the opinion of the Commission to justify a prosecution for the offence, comes to its knowledge, or within twelve months after the commission of the offence, whichever period is the longer.

Proceedings may be commenced within three months of evidence of offence.

(3) For the purpose of the next preceding subsection, a certificate purporting to be signed by the Commission as to the date on which such evidence as aforesaid came to its knowledge shall be conclusive evidence thereof.

Certificate of Commission evidence of date.

33. (1) Where an employer has failed or neglected to pay any contributions which under this Part of this Act he is liable to pay in respect of any employed person in his employment, or has failed or neglected to comply, in relation to any such person, with the requirements of any regulations relating to the payment and collection of contributions, and by reason thereof that person has lost in whole or in part the unemployment benefit to which he would have been entitled under this Part of this Act, he shall be entitled to recover from the employer as a civil debt a sum equal to the amount of the unemployment benefit so lost.

Civil proceedings by employee against employer for neglect to comply with Act.

(2) Proceedings under subsection one of this section may at the instance of an employed person be instituted by the Commission on behalf of such employed person.

Proceedings may be instituted by Commission.

(3) If it is found at any time that any person, by reason of the non-disclosure or misrepresentation by him of a material fact (whether the non-disclosure or the misrepresentation was or was not fraudulent) has received any sum by way of benefit while the statutory conditions or any other conditions for the receipt of benefit imposed by this Part of this Act were not fulfilled in his case, or while he was disqualified for receiving benefit, he shall be liable to repay to the Unemployment Insurance Fund a sum equal to the amount so received by him.

Penalty for receipt of benefit through non-disclosure or misrepresentation of material fact.

(4) Proceedings may be taken under this section notwithstanding that proceedings have been taken under any other provision of this Part of this Act in respect of the same failure or neglect.

Alternative proceedings.

(5) Proceedings under this section may, notwithstanding any provision in any enactment, be brought at any time within one year after the date on which the employed persons, but for the failure or neglect of the employer, would have been entitled to receive benefit which he has lost.

Proceedings may be taken within one year.

(6) Proceedings for the recovery as civil debts of sums due to the Unemployment Insurance Fund established under this Act may not be brought except within three years from the time when the matter complained of arose.

Proceedings for recovery of sums due Insurance Fund may be taken within three years.

Inspection.

Powers of
Inspectors.

34. (1) Any person authorized to act as an inspector by the Commission shall, for the purpose of the execution of this Act, have power to do all or any of the following things, namely:

To enter
premises
other than
private
dwelling.

(a) to enter at all reasonable times any premises or place, other than a private dwelling house not being a workshop, where he has reasonable grounds for supposing that any employed persons are employed;

To make
examination
concerning
compliance
with Act.

(b) to make such examination and inquiry as may be necessary for ascertaining whether the provisions of this Act are complied with in any such premises or place;

To examine
persons.

(c) to examine, either alone or in the presence of any other person, as he thinks fit, with respect to any matters under this Act, every person whom he finds in any such premises or place, or whom he has reasonable cause to believe to be or to have been an employed person, and to require every such person to be so examined, and to sign a declaration of the truth of the matters in respect of which he is so examined;

Other powers.

(d) to exercise such other powers as may be necessary for carrying this Act into effect.

Occupiers of
premises to
facilitate
inspection.

(2) The occupier of any such premises or place and any other person employing any employed person, and the servants and agents of any such occupier or other person and any employed person shall furnish to any inspector all such information and shall produce for inspection all such registers, books, cards, wage sheets, records of wages and other documents as the inspector may reasonably require.

Penalty for
delay or
obstruction
of inspection.

(3) If any person wilfully delays or obstructs an inspector in the exercise of any power under this section or fails to give such information or to produce such documents as aforesaid, or conceals or prevents or attempts to conceal or prevent any person from appearing before or being examined by an inspector, he shall be guilty of an offence against this Act and liable on summary conviction to a fine not exceeding twenty-five dollars.

Inspector to
produce
certificate of
appointment.

(4) Every inspector shall be furnished with the prescribed certificate of his appointment, and on applying for admission to any premises or place for the purpose of this Act shall, if so required, produce the said certificate to the occupier.

Financial Provisions.

Unemploy-
ment
Insurance
Fund.

35. (1) The Minister of Finance shall from time to time deposit in the Bank of Canada, to the credit of the Commission, in an account to be called "The Unemployment Insurance Fund" (hereinafter referred to as "The Fund"),

all revenue received from the sale of unemployment insurance stamps and all contributions, if any, paid otherwise than by means of such stamps (including contributions recovered by process of law) under the provisions of this Part of this Act.

(2) The Minister of Finance shall also deposit in like manner from time to time out of moneys provided by Parliament an amount equal to one-fifth of the aggregate deposits from time to time made as aforesaid after deducting from the said aggregate deposits any refunds of contributions from time to time made under the provisions of this Act from the Fund.

Contributions
out of moneys
provided by
Parliament.

(3) Moneys may be withdrawn from the Fund only by means of cheque or other authorization signed by two Commissioners, and out of the Fund shall be paid all claims for unemployment benefit and refunds of contributions as provided for in this Part of this Act but no other payments.

Withdrawals.

(4) Any sums standing to the credit of the Fund, which are not required to meet current expenditure, may be invested in obligations, payable in Canadian currency, of or guaranteed by the Dominion of Canada and investments so made may be sold or exchanged for other like securities, and interest received on the investments shall be deposited as aforesaid.

Investment
of Fund.

(5) Transactions under the provisions of the last preceding subsection of this section shall be made only on the authorization of an Investment Committee of three members, consisting of one member nominated by the Commission, one member nominated by the Minister of Finance, and the Governor of the Bank of Canada, or in his absence or incapacity, the Deputy Governor or the Acting Governor for the time being.

Transactions
to be
authorized
by Invest-
ment
Committee.

(6) The Bank of Canada shall be employed to carry out transactions authorized by the said Committee under the last preceding subsection of this section.

Bank of
Canada
may be
fiscal agent.

(7) The Commission may open and maintain deposit accounts with chartered banks, including the savings banks named in chapter fourteen, Revised Statutes of Canada, 1927, and any balance maintained in any such bank shall form part of the Fund.

Deposits in
chartered
banks

(8) No such bank, nor the Bank of Canada, shall be entitled to charge any exchange on or fee for cashing any cheque, as defined by the *Special War Revenue Act*, issued by the Commission, and the provisions of section forty-four of that Act shall not apply to such cheques.

No charge
on cheques.

(9) For the purpose of borrowing money, to pay unemployment benefits, the Commission may pledge with the Bank of Canada, any of the securities of the Fund.

Pledging of
securities to
secure loans.

Extension
of powers of
Bank of
Canada.

(10) The powers of the Bank of Canada shall be deemed to include the power to do all of the things required to be done by it under the provisions of this section.

Unemployment Insurance Advisory Committee.

Establish-
ment of Un-
employment
Insurance
Advisory
Committee
and duties of
committee as
respects Un-
employment
Insurance
Fund.

Annual
report.

Reports on
condition of
Fund.

Recommend-
ations if Fund
is or is likely
to become
insufficient
to discharge
liabilities.

36. (1) There shall be appointed by the Governor in Council a committee to be called "The Unemployment Insurance Advisory Committee," in this Act referred to as "the Advisory Committee" or "the Committee" to give advice and assistance to the Commission in relation to the discharge of its functions under this Act, and to perform the other duties herein specified.

(2) The Committee shall, not later than the end of February in each year, make a report to the Governor in Council on the financial condition of the Unemployment Insurance Fund as of the thirty-first day of December next preceding, and shall also make a report to the Governor in Council on the financial condition of that Fund whenever the Committee considers that the Fund is or is likely to become, and is likely to continue to be, insufficient to discharge its liabilities, and may make a report on the financial condition of the Fund at such other times as the Committee may think fit.

(3) If the Committee at any time reports that the Fund is or is likely to become, and is likely to continue to be, insufficient to discharge its liabilities, or is and is likely to continue to be more than reasonably sufficient to discharge its liabilities, the report shall contain recommendations for the amendment, of the provisions of this Act, or of any regulation made thereunder, either generally or in relation to special classes of insured contributors, concern-
ing—

(i) the statutory conditions for receipt of unemployment benefit and the provisions relating to the right to benefit; or

(ii) the disqualifications for unemployment benefit; or

(iii) the meaning of "unemployment," of "unemployed," of "continuous period of employment," of "continuously unemployed," and of "benefit year"; or

(iv) the rates of unemployment benefit, the periods for which such benefit may be paid and the computation thereof; or

(v) the payment of benefit pending appeals; or

(vi) the rates of contribution; or

(vii) the rates of benefits in respect of dependants and the provisions and conditions relating to the payment thereof;

being, if in the opinion of the Committee the Fund is insufficient, such amendment as in the opinion of the Committee is required in order to make the Fund sufficient, or if in the opinion of the Committee the Fund is more than reasonably sufficient to discharge its liabilities, such amendments as in the opinion of the Committee may appropriately be made in the circumstances, and, in either case, the report shall contain an estimate of the effect which the amendments recommended will have on the financial condition of the Fund.

(4) The Committee shall give such public notice as it considers sufficient of its intention to make a report under this section and shall receive any representations which may be made to it with respect thereto.

Notice of intention to make report.

(5) Any report made under this section shall be laid before Parliament within four weeks after being made, or if Parliament is not then sitting within four weeks after Parliament next sits.

Report to be laid before Parliament.

37. (1) The Committee shall consist of a Chairman and not less than four nor more than six other members.

Number of members.

(2) The Chairman and other members shall hold office for a period which, in the case of each of the members first appointed, and of any member appointed to fill a casual vacancy, shall be of such duration not exceeding five years as may be determined by the Governor in Council, and in the case of all other members shall be a period of five years.

Term of office.

(3) No member of the Committee shall be eligible to be elected to, or to sit in, the Parliament of Canada.

Not eligible to sit in Parliament.

(4) Of the said members, other than the Chairman, there shall be appointed either one or two after consultation with organizations representative of workers, and an equal number after consultation with employers.

Members representative of employers and workers.

(5) If, in the opinion of the Minister, a member becomes unfit to continue in office or incapable of performing his duties, the Minister shall forthwith report the facts to the Governor in Council and the Governor in Council may declare vacant the office of such member.

Unfitness or incapacity of member.

(6) The Minister may assign to the Committee from the public service of Canada or otherwise such professional, technical, secretarial and other assistance as the Committee may require, but the provision of such assistance otherwise than from the said service shall be subject to authorization by the Governor in Council.

Assistance for Committee.

(7) The Committee may act notwithstanding any vacancy in the membership of the Committee.

Vacancy.

Rules and
Quorum.

(8) The Committee may make rules for regulating the procedure of the Committee.

Information
to be
available to
Committee.

(9) The Commission shall make available to the Committee such information as they may reasonably require for the proper discharge of their functions under this Act.

Expenses.

(10) Members of the Committee shall be entitled to indemnity for travelling and other expenses incurred in the discharge of their duties under this Act.

Regulations.

Regulations.

§ 8. In addition to the authority otherwise conferred upon the Commission to make regulations under this Act, the Commission may also make regulations;—

Persons under
same
employer
partly in
insurable
employment
and partly in
another
occupation.

(a) for permitting persons who are engaged under the same employer, partly in insurable employment and partly in some other occupation, to be treated, with the consent of the employer, for the purposes of this Act, as if they were wholly engaged in insurable employment; and

Prescribing
evidence
required.

(b) for prescribing the evidence to be required as to the fulfilment of the conditions and the absence of the disqualifications for receiving or continuing to receive unemployment benefit, and for that purpose requiring the attendance of insured contributors at such offices or places and at such time as may be required, and requiring employers to answer inquiries relating to any matters on which the fulfilment of the conditions or the absence of the disqualifications depends; and

Procedure on
claims for
unemploy-
ment benefit.

(c) for prescribing the manner in which claims for unemployment benefit may be made and the procedure to be followed on the consideration and examination of claims and questions to be considered by the Commission, insurance officer, courts of referees, and umpire, and the mode in which any question may be raised as to the continuance, in the case of a person in receipt of unemployment benefit, of the benefit; and,

Acting
umpires.

(d) for making provision for the appointment of persons to act in the place of the umpire in the case of his unavoidable absence or incapacity; and

Payment of
benefits and
contributions
pending
determina-
tion of
question.

(e) with respect to the payment of contributions and benefits during any period intervening between any application for the determination of any question or any claim for benefit and the final determination of the question or claim; and

References to
central or
local
Committees.

(f) to provide for the reference to central or to local committees representing employers and employed persons, for consideration and advice of questions bearing upon the administration of this Act; and

- (g) for prescribing, either generally or with respect to any special class of cases, that where a period of employment begun on one day extends over midnight into another day, the person employed shall be treated as having been employed on such one or other only of those two days as the regulations may direct; and
- (h) to provide, with the concurrence of the Postmaster General, for enabling claimants of unemployment benefit in remote places to make their claims for unemployment benefit through the Post Office, and for the payment of unemployment benefit of such claimants through the Post Office; and
- (i) for prescribing punishment for the violation of any regulation including maximum and minimum fines but not exceeding fifty dollars, and terms of imprisonment not exceeding three months; and
- (j) generally for carrying this Act into effect.
- Provision as to persons employed on night work.
- Payment of contributions and benefits through Post Office in remote places.
- Penalties.
- Generally.

PART IV.

NATIONAL HEALTH.

39. The duties and powers of the Commission under this Part of this Act shall be exercised, so far as may be found practicable and expedient, in co-operation with any department or departments of the Government of Canada, with the Dominion Council of Health, with any province or any number of provinces collectively, or with any municipality or any number of municipalities collectively, or with associations or corporations.

Co-operation in matters of Health and Health Insurance.

40. It shall be the duty of the Commission

- (a) to assemble reports, publications, information and data concerning any scheme or plan, whether a state, community or other scheme or plan for any group or class of persons, and whether in operation or proposed, in Canada or elsewhere, of providing, on a collective or on a co-operative basis by means of insurance or otherwise, for
- (i) medical, dental and surgical care, including medicines, drugs, appliances, or hospitalization, or
- (ii) compensation for loss of earnings arising out of ill-health, accident or disease;
- To collect information and data.

To make information and data available.

(b) to analyze and make available to any province, municipality, corporation or group of persons desiring to use the information so assembled for the purpose of providing such benefits or any of them; and

To examine and report on proposed scheme.

(c) as far as may be found practicable so to do on request by any province, municipality, corporation or group of persons, to examine and report on any such scheme or plan proposed to be put into effect or in effect at the date of such request, and to afford technical and professional guidance in regard to the establishing, working or reorganization of the scheme or plan.

Proposals to Governor in Council: Special investigation.

41. The Commission may from time to time submit to the Governor in Council proposals for co-operation by the Dominion in providing any of the benefits enumerated in paragraph (a) of the next preceding section of this Act for such action as the Governor in Council is authorized to take, and may undertake special investigations in regard thereto, subject to approval of the Governor in Council concerning the scope and nature of each such investigation.

PART V.

GENERAL.

Governor in Council to approve regulations.

42. (1) All regulations made under this Act shall be without effect until approved by the Governor in Council and published in the *Canada Gazette*, and shall have effect as if enacted in this Act and shall be laid before Parliament within two weeks after approval, or, if Parliament is not then sitting, within two weeks after Parliament next sits; and any regulation made as aforesaid may be varied or revoked by any subsequent regulation made in like manner.

Report by Advisory Committee.

(2) All regulations made under the provisions of section twenty-five of this Act or in relation to the matters specified in subsection three of section thirty-six of this Act shall be reported on by the Unemployment Insurance Advisory Committee before being acted upon by the Governor in Council.

Annual Report by Commission.

43. Within one month after the thirty-first day of March in each year, or within such longer period as may be approved by the Governor in Council, the Commission shall submit to the Minister a report covering the business and affairs of the Commission, for the twelve months ending on the said thirty-first day of March, in such detail as the Minister may from time to time direct; and such report shall contain a statement of the costs arising out of the

administration of this Act, including the indirect costs as nearly as they may be ascertainable.

(2) The Minister shall lay before Parliament, any such report within fifteen days after it is submitted to him if Parliament is then in Session, or, if not then in session, within fifteen days after the opening of the next following session.

44. All reports, recommendations and submissions required to be made under this Act to the Governor in Council, whether by the Commission or by the Advisory Committee, shall be submitted by the Minister.

Reports transmitted through the Minister to the Governor in Council.

45. Any fine imposed under this Act or regulations made hereunder shall be payable to His Majesty in the right of the Dominion of Canada and be disposed of as the Governor in Council may direct.

Deposition of Fines.

46. The *Employment Offices Co-ordination Act*, chapter fifty-seven of the Revised Statutes of Canada, 1927, may be repealed by Proclamation of the Governor in Council.

Repeal.

47. The Commission shall be subject to the provisions of *The Consolidated Revenue and Audit Act, 1931*.

Audit.

48. This Act shall come into force when assented to: provided that no contribution shall be payable or paid under the provisions of Part III of this Act until a date to be set by the Commission of which due notice shall be published in the *Canada Gazette* and in such other manner as the Commission may deem necessary.

Act to become operative.

SCHEDULES.

FIRST SCHEDULE.

EMPLOYMENT WITHIN THE MEANING OF PART III OF THIS ACT.

PART I.

- (a) Employment in Canada under any contract of service or apprenticeship, written or oral, whether expressed or implied, or whether the employed person is paid by the employer or some other person, and whether under one or more employers, and whether paid by time or by the piece, or partly by time and partly by the piece, or otherwise.
- (b) Employment under the Dominion, or under any province of Canada with the concurrence of the province, or under any municipal or other public authority, other than any such employment as may be excluded by special order of the Commission.
- (c) Employment outside of Canada, or partly outside of Canada, for the purpose of the execution of some particular work, by persons who were insured contributors immediately before leaving Canada, for an employer resident or having a place of business in Canada, being employment which if it were employment in Canada, would make the persons employed therein employed persons within the meaning of this Act; subject however, to any prescribed conditions, modifications or exceptions.

PART II.

EXCEPTED EMPLOYMENTS.

- (a) Employment in agriculture, horticulture and forestry.
- (b) Employment in fishing.
- (c) Employment in lumbering and logging, exclusive of such saw mills, planing mills and shingle mills as are reasonably continuous in their operations.
- (d) Employment in hunting and trapping.
- (e) Employment in transportation by water or by air, and stevedoring.
- (f) Employment in domestic service, except where the employed person is employed in a club or in any trade or business carried on for the purposes of gain.

- (g) Employment as a professional nurse for the sick or as a probationer undergoing training for employment as such nurse.
- (h) Employment as a teacher, including teachers of music and dancing, whether engaged in schools, colleges, universities or institutes or in a private capacity.
- (i) Employment in the Permanent Active Militia, The Royal Canadian Navy, the Royal Canadian Air Force and the Royal Canadian Mounted Police.
- (j) Employment as a member of Dominion, Provincial, or Municipal Police forces.
- (k) Employment—
 - (i) in the public service of Canada pursuant to the provisions of the *Civil Service Act*; or
 - (ii) in the public service of Canada or of a province or by a municipal authority upon certification satisfactory to the Commission that the employment is, having regard to the normal practice of the employment, permanent in character.
- (l) Employment as an agent paid by commission or fees or a share in the profits, or partly in one and partly in another of such ways, where the person so employed is mainly dependent for his livelihood on his earnings from some other occupation, or where he is ordinarily employed as such agent by more than one employer, and his employment under no one of such employers is that on which he is mainly dependent for his livelihood.
- (m) Employment otherwise than by way of manual labour and at a rate of remuneration exceeding in value two thousand dollars a year or in cases where such employment involves part time service only, at a rate of remuneration which, in the opinion of the Commission, is equivalent to a rate of remuneration exceeding two thousand dollars a year for full time service.
 Provided that any person in respect of whom contributions have been paid as an insured contributor for not less than five hundred weeks may continue as an insured contributor notwithstanding anything in this paragraph contained.
- (n) Employment of a casual nature otherwise than for the purpose of the employer's trade or business.
- (o) Employment of any class which may be specified in a special order made by the Commission, and declared by the Commission to apply for the purposes of this Act, as being of such a nature that it is ordinarily adopted as subsidiary employment only and not as the principal means of livelihood.

- (p) Employment in the service of the husband or wife of the employed person.
- (q) Employment for which no wages or other money payment is made, where the person employed is the child of, or is maintained by the employer.
- (r) Employment in which persons are employed and paid for playing any game.

SECOND SCHEDULE.

PART I.

WEEKLY RATES OF CONTRIBUTION.

Class of employed person:	By the employer	By the employed person
Aged 21 years and upwards—		
Men.....	\$0 25	\$0 25
Women.....	0 21	0 21
Aged 18 years and under 21 years:		
Young men.....	0 18	0 18
Young women.....	0 15	0 15
Aged 17 years and under 18 years:		
Boys.....	0 11	0 11
Girls.....	0 09	0 09
Aged 16 years and under 17 years:		
Boys.....	0 07	0 07
Girls.....	0 06	0 06

PART II.

RULES AS TO PAYMENT AND RECOVERY OF CONTRIBUTIONS PAID BY EMPLOYERS ON BEHALF OF EMPLOYED PERSONS.

1. Subject to section twenty-five of this Act a weekly contribution shall be payable for each calendar week during the whole or any part of which an employed person has been employed by an employer:

Provided that where one weekly contribution has been paid in respect of an employed person in any week, no further contribution shall be payable in respect of him

in the same week, and that, where no remuneration has been received, and no services rendered by an employed person during any such week, the employer shall not be liable to pay and shall not pay any contribution either on his own behalf or on behalf of the employed person for that week:

Provided further that the employed person shall be entitled to a refund of contributions paid by him for any days of any such week (exclusive of any fraction of a day) in respect of which he proves that he was unemployed within the period of five years immediately preceding the date on which he makes application for unemployment benefit, and the whole of the refund to which he may be so entitled shall be payable to him at the same time as the first payment of unemployment benefit is payable to him on that application.

2. The employer shall, except as hereinafter provided, be entitled to recover from the employed person the amount of any contributions paid by him on behalf of the employed person.

3. Where the employed person receives any wages or other pecuniary remuneration from the employer, the amount of any contribution paid by the employer on behalf of the employed person shall, notwithstanding the provisions of any Act or any contract to the contrary, be recoverable by means of deductions from the wages of that person or from any other remuneration due from the employer to that person and not otherwise: Provided that no such deduction may be made—

(a) from any wages or remuneration other than such as are paid in respect of the period or part of the period for which the contribution is payable; or

(b) in excess of the sum which represents the amount of the contributions for the period (if that period is longer than a week) in respect of which the wages or other remuneration are paid.

4. Where the employed person does not receive any wages or other pecuniary remuneration from the employer, but receives such remuneration from some other person, the amount of any contribution paid by the employer on behalf of the employed person shall (without prejudice to any other means of recovery) be recoverable summarily as a civil debt, if proceedings for the purpose are instituted within three months from the date on which the contribution was payable.

5. Where the employed person is employed by more than one person in any calendar week, the first person employing him in that week, or such other employer or employers as may be prescribed, shall be deemed to be the employer for the purposes of the provisions of this Act relating to the payment of contributions and of this Schedule.

6. Regulations made under this Act may provide that in any cases or any classes of cases where employed persons work under the general control and management of some person other than their immediate employer, such as the owner, agent or manager of a mine or quarry, or the occupier of a factory or workshop, such person shall, for the purposes of the provisions of this Act relating to the payment of contributions and of this Schedule, be treated as the employer, and may provide for allowing him to deduct the amount of any contributions (other than employer's contributions) which he may become liable to pay from any sums payable by him to the immediate employer, and for enabling the immediate employer to recover from the employed persons the like sums and in the like manner as if he were liable to pay the contributions.

7. Where the employed person is not paid wages or other money payments by his employer or any other person, the employer shall be liable to pay the contributions payable both by himself and the employed person and shall not be entitled to recover any part thereof from the employed person.

8. Notwithstanding any contract to the contrary, the employer shall not be entitled to deduct from the wages of, or otherwise to recover from the employed person, the employer's contribution.

9. Any sum deducted by an employer from wages or other remuneration under this schedule shall be deemed to have been entrusted to him for the purpose of paying the contribution for which it was deducted.

10. Subject to section twenty-five of this Act, for the purposes of this schedule, the expression "calendar week" means the period from twelve o'clock in the afternoon on one Sunday to twelve o'clock in the afternoon on the following Sunday.

THIRD SCHEDULE.

PART I.

RATES OF UNEMPLOYMENT BENEFIT.

Class of insured person—	Daily Rate	Weekly Rate
Aged 21 years and upwards		
Men.....	\$1 00	\$6 00
Women.....	0 85	5 10
Aged 18 years and under 21 years		
Young men.....	0 70	4 20
Young women.....	0 60	3 60

Aged 17 years and under 18

years

Boys.....	0 45	2 70
Girls.....	0 35	2 10

Aged 16 years and under 17

years

Boys.....	0 30	1 80
Girls.....	0 25	1 50

Dependents' benefit—

Adult dependent.....	0 45	2 70
Dependent child.....	0 15	0 90

PART II.

SUPPLEMENTARY PROVISIONS GOVERNING THE PAYMENT OF
UNEMPLOYMENT BENEFIT.

1. No person shall receive benefit for any fraction of a day, nor for the first nine days of any period of continuous unemployment.

2. Subject to the provisions hereinafter in this schedule contained, where a person entitled to benefit

(a) is a married man whose wife is living with him or is being maintained wholly or mainly by him; or

(b) being either a man or a woman (but not being a person entitled to an increase under this provision otherwise than in respect of his or her dependent children), has residing with him or her, and is wholly or mainly maintaining, a female person who has the care of the dependent children of the person entitled to benefit; or

(c) is a married woman who has a husband dependent on her;

the rate of benefit of such person as shown in Part I of this Schedule shall be increased by the amount of the adult dependent's benefit there shown, and where the person so entitled to benefit has dependent children, the said rate of benefit of such person shall be increased in respect of each dependent child by the amount of the dependent child's benefit shown in Part I of this Schedule;

Provided that the additional benefit aforesaid shall not be payable in respect of a wife or female person who is in receipt of benefit, or who is in regular wage-earning employment otherwise than as having the care of the dependent children of the person entitled to benefit, or is engaged in any occupation ordinarily carried on for profit:

Provided further that benefit in respect of only one dependent adult shall be paid to any insured person entitled to benefit and the total benefit paid to any such person,

including dependents' benefits, shall not exceed eighty per centum of the wages or compensation of which he is deprived by unemployment, having regard for his average earnings during periods of employment during the six months preceding the date of claim for benefit.

3. If any question arises as to whether any addition ought to be made to the rate of benefit in respect of any wife or child or other person, that question shall be determined in the same manner as a claim for benefit.

4. No increase of benefit shall be payable to an insured contributor in respect of any person for any period before the date on which the insured contributor makes application in the prescribed manner for an increase in respect of that person, so, however, that regulations may be made under this Act authorizing some earlier date to be substituted for the date of the application in cases in which good cause is shown for the delay in making the application.

5. Where a claim for benefit is made by an insured contributor and another insured contributor receives an increase of benefit in respect of the first mentioned insured contributor for any period between the date when the claim is made and the date when it is allowed, the benefit payable to the first mentioned insured contributor for that period shall be reduced by the amount of increase of benefit so received by the second-mentioned insured contributor.

6. For the purposes of this Schedule the expression "a dependent child" means, in relation to a person entitled to benefit, any child of his who

(a) is under the age of 14 years and is maintained wholly or mainly by him; or

(b) is between the ages of 14 and 16 years and is maintained wholly or mainly by him and is either

(i) a person under full time instruction at a day school; or

(ii) a person who is prevented from receiving such instruction by reason of illness or physical or mental infirmity;

and the expression "child" includes a stepchild, adopted child, and illegitimate child.

JUDGMENT OF THE SUPREME COURT OF CANADA

1936
S.C.R.
427.

* Jan. 31,
* Feb. 1, 3,
* June 17.

IN THE MATTER OF A REFERENCE AS TO
WHETHER THE PARLIAMENT OF CANADA
HAD LEGISLATIVE JURISDICTION TO EN-
ACT THE EMPLOYMENT AND SOCIAL INSUR-
ANCE ACT, BEING CHAPTER 38 OF THE STA-
TUTES OF CANADA, 1935.

*Constitutional law—The Employment and Social Insurance Act, 25-26
Geo. V, c. 38—Constitutional validity—Taxation—Property and civil
rights.*

The *Employment and Social Insurance Act* provides (Part I, sections 4 to 9 inclusive) for the administration of the Act by a Commission consisting of three members to be called the Employment and Social Insurance Commission, whose duties are defined in these sections. Part II (sections 10 to 14 inclusive) of the Act provides for the organization and administration by the Commission of an employment service for the Dominion of Canada with regional divisions and a central employment office and employment offices within each division. Part III (sections 15 to 38 inclusive) of the Act provides for the establishment of an Unemployment Insurance Fund out of which unemployment insurance benefits would be payable to all persons of the age of sixteen years and upwards who are engaged in any of the insurable employments specified in the Act. Such fund is to be derived partly from moneys provided by Parliament and partly from compulsory contributions by employers and workers. The statutory conditions governing the eligibility and ineligibility of insured contributors for the receipt of benefits are defined in the Act. Penalties are provided for fraudulently obtaining benefits or evading payment and for other violations of the Act or the regulations under it. Part IV (sections 39 to 41 inclusive) of the Act, under the heading "National Health," charges the Commission with the duty of collecting information concerning any scheme, actual or proposed, for providing medical, dental, surgical and hospital care, and compensation for loss of earnings due to ill-health or accident. (Further particulars of the Act are contained in the judgments reported.)

Held, per Rinfret, Cannon, Crocket and Kerwin JJ. that the Act is *ultra vires* of the Parliament of Canada; Duff C.J. and Davis J. holding that the Act is *intra vires*.

Per Rinfret, Cannon, Crocket and Kerwin JJ.—The validity of the legislation cannot be supported either as an exercise of the residuary power to make laws for the peace, order and good government of Canada, or as an exercise of the power to regulate trade and commerce.

The proposition that the Act could be supported in virtue of the power of the Dominion Parliament concerning statistics or criminal law need not retain our attention.

The legislation is not based on the Treaty of Peace (1919) and, therefore, no reliance for its validity can be made on section 132 of the B.N.A. Act.

Nor can it be supported under "the power to raise money by any mode or system of taxation," or "the power to appropriate public money for any public purpose." The statute, in its substance, is not an

*PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket, Davis and Kerwin JJ.

1936
—
REFERENCE
re
THE
EMPLOY-
MENT AND
SOCIAL
INSURANCE
ACT.

exercise of those powers. It clearly indicates that the Parliament of Canada intended primarily to legislate with regard to employment service, to unemployment insurance and to health matters. It is not concerned either with public debt and property or with the raising of money by taxation. Its provisions for levying contributions for the creation of the Unemployment Insurance Fund are nothing more than provisions to enable the carrying out of the true and only purpose of the legislation. These contributions (or taxes, if they are to be so called) are mere incidents of the attempted regulation of employment service and unemployment insurance.

It being well understood, and in fact conceded, that the subject-matters of the Act fall within the legislative authority of the provinces, the Dominion Parliament may not, under pretext of the exercise of the power to deal with its property or to raise money by taxation, indirectly accomplish the ends sought for in this legislation.

The effect of the Act under submission is "to attach statutory terms to contracts of employment" (Lord Haldane in *Workmen's Compensation Board v. Canadian Pacific Railway*, [1920] A.C. 184); and its immediate result is to create civil rights as between employers and employees. The Dominion Parliament cannot use its power of taxation to compel the insertion of conditions of that character in ordinary employment contracts.

Per Duff C.J. and Davis J. dissenting.—The aims stated in the preamble of the Act are legitimate, provided, of course, that the enactments themselves are within the ambit of the legislative powers possessed by Parliament. Reading subdivision 1 of section 91 and subdivision 3 of the B.N.A. Act together, the proper conclusion is that Parliament has exclusive authority to raise money by any mode or system of taxation for disposition by Parliament for any purpose for which it is competent to Parliament to apply the assets of the Dominion in virtue of subdivision 1. In effect, subdivision 1 endows the High Court of Parliament with full discretionary authority to dispose of the public assets of the Dominion, and no other court is invested with jurisdiction to examine any purported exercise of that authority with a view to pronouncing upon its validity, subject only to the rule that the courts are always entitled to determine whether, in truth, any given enactment of Parliament professing to be an exercise of a given authority is not really an enactment of that character; but one relating to a subject over which Parliament has no jurisdiction.

The provisions requiring compulsory contributions by employers and employed possess the essential elements of legislation respecting taxation. On their true construction, they have that character because, first, it would not be competent to a provincial legislature to enact them in the context in which they stand, which demonstrates that the contributions are exacted for the purpose of raising moneys for exclusive disposition by Parliament; and, second, there is no adequate ground for holding that they are, either in purpose of in immediate effect, outside the ambit of the powers under subdivision 3.

So also as regards the enactments concerning the disposition of the proceeds of the levies upon employers and employed and of the contribution from the Dominion treasury. They are not enactments in respect of property and civil rights in any one province or in all of the provinces. They would not be competent as enactments by any or all of the provincial legislatures, and there is no adequate ground for affirming that these enactments are not legislation in relation to the subjects within the scope of subdivision 1.

Parliament can in the legitimate exercise of its exclusive authority under subdivisions 1 and 3 of section 91 of the B.N.A. Act, levy taxes for the purpose of raising money to constitute a fund to be expended, in conformity with the directions of Parliament, in unemployment benefits, and provide for a contribution to that fund from the Dominion treasury, and in executing these exclusive powers, Parliament is not subject to any control by the courts as to the form of the taxation or the incidence of it or as touching the manner or conditions of the payment of benefits.

Complete discretionary authority respecting the form and incidence of taxation under subdivision 3, and respecting the disposal of all public assets under subdivision 1, are essential to enable Parliament to discharge the responsibilities entrusted to it.

Legislation for raising money for disposition by Parliament under subdivision 3 of section 91, and directing the disposition of it under subdivision 1, is necessarily excluded from the jurisdiction of the provinces by the concluding words of section 91; and there is no sufficient ground for affirming that, in the enactments of this statute, Parliament is not exercising its powers under these subdivisions, or, in other words, that under the guise of doing so it is invading a provincial field from which it is excluded, for the purpose of attaining a result which it has full power to attain by legislating within fields in which it has exclusive authority.

REFERENCE by His Excellency the Governor General in Council to the Supreme Court of Canada, in the exercise of the powers conferred by section 55 of the *Supreme Court Act* (R.S.C. 1927, c. 35), of the following question: Is the *Employment and Social Insurance Act*, or any of the provisions thereof and in what particular or particulars or to what extent, *ultra vires* of the Parliament of Canada?

The Order in Council referring the question to the Court reads as follows:

The Committee of the Privy Council have had before them a report, dated 31st October, 1935, from the Minister of Justice, referring to the *Employment and Social Insurance Act*, chapter 38 of the statutes of Canada, 1935, which was passed for the purposes set out in the recitals contained in the preamble of the said Act.

The Minister observes that doubts exist or are entertained as to whether the Parliament of Canada had legislative jurisdiction to enact the said Act, either in whole or in part, and that it is expedient such question should be referred to the Supreme Court of Canada for judicial determination.

The Committee, accordingly, on the recommendation of the Minister of Justice, advise that the following question be referred to the Supreme Court of Canada, for hearing

1936
REFERENCE
72
THE
EMPLOY-
MENT AND
SOCIAL
INSURANCE
ACT.

1936
 {
 REFERENCE
 re
 THE
 EMPLOY-
 MENT AND
 SOCIAL
 INSURANCE
 ACT.
 —

and consideration, pursuant to section 55 of the *Supreme Court Act*,—

Is the *Employment and Social Insurance Act*, or any of the provisions thereof and in what particular or particulars or to what extent, *ultra vires* of the Parliament of Canada?

E. J. LEMAIRE,
Clerk of the Privy Council.

* The judgment of Duff C.J. and Davis J. was delivered by

DUFF C.J.—The preamble to the statute is as follows:—

WHEREAS the Dominion of Canada was a signatory, as part of the British Empire, to the Treaty of Peace made between the Allied and Associated Powers and Germany, signed at Versailles, on the 28th day of June, 1919; and whereas the said Treaty of Peace was confirmed by the *Treaties of Peace Act* 1919; and whereas, by article 23 of the said Treaty, each of the signatories thereto agreed that they would endeavour to secure and maintain fair and humane conditions of labour for men, women and children, both in their own countries and in all countries to which their commercial and industrial relations extend, and by article 427 of the said Treaty declared that the well-being, physical, moral and intellectual, of industrial wage-earners is of supreme international importance; and whereas it is desirable to discharge the obligations to Canadian labour assumed under the provisions of the said Treaty; and whereas it is essential for the peace, order and good government of Canada to provide for a National Employment Service and Insurance against unemployment, and for other forms of Social Insurance and for the purpose of maintaining on equitable terms, interprovincial and international trade, and to authorize the creation of a National Fund out of which benefits to unemployed persons throughout Canada will be payable and to provide for levying contributions from employers and workers for the maintaining of the said Fund and for contributions thereto by the Dominion: Therefore His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

No one of the aims stated in this preamble is illegitimate as an ultimate aim of legislation by the Parliament of Canada. If the subject matter of the enactment is within the ambit of the powers vested in Parliament it is lawful for Parliament to exercise those powers for the attainment of any or all of the objects set forth.

The immediate effect of the statute is to provide, by the means prescribed, a system of unemployment insurance. The essential elements of the scheme are the creation of the Fund—the Unemployment Insurance Fund—which is provided in part from compulsory contributions by em-

* *Reporter's note:* Counsel on the argument of this Reference were the same as those mentioned at p. 365.

ployers and employees in the insured employments, and in part by contributions from the Dominion Treasury under the authority of Parliament. The administration of the Fund is entrusted to a board and unemployment benefits are payable by the Board out of the Fund to designated classes of unemployed persons under prescribed statutory conditions.

The exclusive legislative authority of Parliament extends *inter alia* to the subject "The Public . . . Property." It cannot be doubted, we think, that "property" here is used in its broadest sense, and includes every kind of asset. This legislative authority is exercisable "notwithstanding anything in this Act." There is always, of course, the qualification, and everything hereinafter said is subject to that qualification, that Parliament is incapable of acquiring jurisdiction over matters within the exclusive competence of the provinces by legislating upon those matters under the pretence of exercising a power which does not embrace within its ambit the real subject matter of the legislation. Subject to that qualification, we know of no authority by which His Majesty's Courts have jurisdiction to examine, with a view to pronouncing upon its validity, legislation by Parliament in relation to the disposition of the assets committed to its control by section 91, B.N.A. Act.

Some reference was made on the argument to sections 102 and 106 B.N.A. Act, but we cannot find anything in those sections which in any way qualifies the authority bestowed by section 91. The phrase in section 106 "shall be appropriated by the Parliament of Canada for the public service" cannot, with propriety, be read, especially in view of the words already mentioned "notwithstanding anything in this Act," as restricting the discretion of the High Court of Parliament to determine finally what objects are and what objects are not within the scope of the words "for the public service of Canada."

It cannot, therefore, we think—and we do not think this was disputed on the argument, although we do not desire to put what we have to say upon any suggested admission—at all events, it cannot, we think, be disputed, even with plausibility, that, in point of strict law, Parliament has authority to make grants out of the public monies to individual inhabitants of any of the provinces, for example,

1936
REFERENCE
re
THE
EMPLOY-
MENT AND
SOCIAL
INSURANCE
ACT.
Duff C.J.

1936
 {
 REFERENCE
 re
 THE
 REFERENCE
 re
 THE
 EMPLOY-
 MENT AND
 SOCIAL
 INSURANCE
 ACT.

Duff C.J.
 —

for relief of distress, for reward of merit, or for any other object which Parliament in its wisdom may deem to be a desirable one. The propriety of such grants, the wisdom of such grants, the convenience or inconvenience of the practice of making such grants, are considerations for Parliament alone, and have no relevancy in any discussion before any Court concerning the competence of Parliament to authorize them.

We are satisfied, therefore, that, if Parliament, out of public monies exclusively, were to constitute a fund for the relief of unemployment and to give to unemployed persons a right to claim unemployment benefits, to be paid out of that fund upon such conditions that Parliament might see fit to prescribe, no plausible argument could be urged.

It seems equally clear that it is exclusively within the discretion of Parliament to determine the manner in which the public assets should be appropriated and applied for such purposes. The proceeds of any given tax, the sales tax, for example, might be validly appropriated for the purposes of such a fund. The appropriation might be affected antecedently by a direction that all or part of the proceeds of the tax should form such a fund in the hands of the Minister of Finance, or of any agency that might be designated for the purpose. The statute might take the form of requiring the Minister of Finance to pay into the fund monies from time to time provided by Parliament. True, the expectations of the authors of the scheme or of the intended beneficiaries might in any such case be falsified. Future Parliaments might find themselves in a state of financial embarrassment making it impossible to carry out the plan, or, if you like, regardless of the consequent disappointment and suffering, under altered views of policy or duty, abrogate the scheme and discontinue the payment of the benefits. But such possibilities and contingencies have no bearing upon the validity of such an enactment.

By section 35 (2) the statute now before us enacts as follows:—

The Minister of Finance shall also deposit in like manner from time to time out of moneys provided by Parliament an amount equal to one-fifth of the aggregate deposits from time to time made as aforesaid after deducting from the said aggregate deposits any refunds of contributions from time to time made under the provisions of this Act from the Fund.

Some comment was made upon this provision; but the gist of the comment was that the observance of the mandate laid upon the Minister of Finance is necessarily contingent upon some further legislative act making available "monies provided by Parliament."

The enactment, nevertheless, is an enactment dealing with the public assets of the Dominion; it gives an explicit direction to the Minister of Finance as to the application of "monies provided by Parliament" for the purposes of the statute. The circumstance that the fate of the scheme may be dependent upon the action of future Parliaments is a circumstance which is of no pertinence in a question of the authority of the Parliament to give such a direction.

The real weight of the arguments against the legislation is to be found in the contention that the provisions of the statute are enactments on the subject of "property and civil rights" and not enactments touching any subject falling within the enumerated heads or the introductory words of section 91 B.N.A. Act. This argument has two branches. First of all, it is said that, as regards compulsory contributions, the legislation creates a compulsory contract between the persons liable to contribute and the Crown, or the Minister of Finance, to whom, in effect, the contributions are payable. Second, it is said, adapting the language of Lord Haldane in delivering the judgment in *Workmen's Compensation Board v. C.P.R.* (1), that the statute attaches statutory terms to contracts of employment; and that this is the real pith and substance of it.

The Dominion contends that the compulsory contributions are contributions which Parliament is competent to exact under the third subdivision of section 91, by which the exclusive legislative authority of Canada extends to all matters within the subject "The raising of money by any mode or system of taxation." As introductory to an examination of the argument on behalf of the Dominion, some brief general observations on this third subdivision of section 91 will not be out of place.

The authority, it will be noticed, is an authority to legislate in relation to the raising of money. There is no

1936
REFERENCE
re
THE
EMPLOY-
MENT AND
SOCIAL
INSURANCE
ACT.
Duff C.J.
—

1936
 {
 REFERENCE
 re
 THE
 EMPLOY-
 MENT AND
 SOCIAL
 INSURANCE
 ACT.

 Duff C.J.

limitation in those words as respects the purpose or purposes to which the money is to be applied. An enactment, the real purpose of which is to raise "money by any mode or system of taxation," is not examinable by the courts as to its validity by a reference to the motives by which Parliament is influenced, or the ultimate destination of the proceeds of the tax. We speak, of course, subject to the qualification explained above which we shall not restate. There is one express qualification in the B.N.A. Act. That is contained in section 125 and precludes the taxation of the public property of the Dominion or of the provinces. Reading the words of subdivisions 1 and 3 together, we have no doubt that the words of subdivision 3 necessarily mean that Parliament is empowered to raise money, for the exclusive disposition of Parliament, by any mode or system of taxation.

In passing, it will not be out of place to observe that, reading the words of head no. 3 in this way helps to remove the difficulty which has been suggested in reconciling the language of head no. 3 of section 91 with head no. 2 of section 92, "direct taxation for provincial purposes within the province." If you read head no. 2 of section 92 with section 126, and by the light of the observations of Lord Watson in *St. Catherine Milling Co. v. The Queen* (1) there is, we think, solid ground for the conclusion that the words "for provincial purposes" mean neither more nor less than this: the taxing power of the legislatures is given to them for raising money for the exclusive disposition of the legislature. In this view, the subdivision of section 91 which deals with taxation, and section 92 which deals with the same subject, are on different planes and cannot come into conflict.

Even if to the words "for provincial purposes" in head no. 2 of section 92 there be ascribed a more restrictive operation, it seems clear enough that the power to legislate for taxation under that head, which is concerned with taxation under that head, which is concerned with taxation for the purpose of raising monies for the exclusive disposition of the local legislature (even assuming, as we say, that in such disposition the provincial legislature is subject to some additional limitation imposed by the phrase

“provincial purposes”) there is nothing in this head which can conflict with the exclusive authority given by the third head of section 91 “notwithstanding anything in this Act” to raise money by any mode or system of taxation for the exclusive disposition of Parliament. The two enactments are still on different planes. The one is concerned with raising money to be appropriated by the provincial legislatures exclusively, the other is concerned with raising money to be appropriated by Parliament exclusively for those purposes to which it thinks it advisable to devote the public assets of the Dominion.

1936
REFERENCE
re
THE
EMPLOY-
MENT AND
SOCIAL
INSURANCE
ACT.
Duff C.J.

At all events, it seems to be abundantly clear that there is nothing in either section 91 or section 92 which precludes the Dominion from raising money by any mode or system of taxation to be expended in the relief of distress among the inhabitants of any one or more provinces by direct application for the benefit of the inhabitants as individuals, still less for raising money to be expended for the relief of the inhabitants of the Dominion, almost all of whom are necessarily inhabitants of the provinces. The inhabitants of the provinces are taxable by the Dominion in order to raise moneys for any purpose in the furtherance of which it is competent to the Dominion to expend such moneys in exercise of its exclusive and plenary control over the public assets.

It is not improper here, we think, to advert to the character of the legislative powers of Parliament. We have had occasion to observe in connection with one of the other references that certain negative provisions of the Statute of Westminster emphasize in the most significant way the scope and character of these powers. First, there are the Recitals that

* * * it is meet and proper to set out by way of preamble to this Act that, inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom:

and that,

* * * it is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion:

1936
 REFERENCE
 re
 THE
 EMPLOY-
 MENT AND
 SOCIAL
 INSURANCE
 ACT.
 Duff C.J.

Then, there is the enactment, section 7 (1), which, in categorical terms, provides that nothing in the Act shall be deemed to apply to the repeal, amendment or alteration of the *British North America Acts*, 1867 to 1930, or any order, rule or regulation made thereunder.

Subject to the restrictions in the Statute of Westminster and the *British North America Act*, and to whatever restrictions may be implied in the status of the Dominion, as owing a common allegiance to the Crown with the other members of the British Commonwealth, the Parliament of Canada is invested with plenary authority to legislate for the peace, order and good government of Canada over the whole field of legislative action, saving only those fields which, by the enactments of the *British North America Act*, have been withdrawn from it and assigned exclusively to the provincial legislatures.

This authority is not a delegated authority, as, for example, that of the legislative bodies of the United States. It is an authority which exists in virtue of the supreme law of the state and is of the same order, subject, of course, to the restrictions mentioned, as the legislative authority of the Imperial Parliament.

The language of subdivision 3 could hardly be broader. "Any mode or system of taxation" leaves in Parliament unlimited discretion so long as the essentials of taxation are present.

By section 17 of the statute now before us, the employed and employer are "liable" to pay contributions in accordance with the provisions of the second schedule of the Act which prescribes the rate of contribution. The payments are to be made by means of revenue stamps and section 18 authorizes the Governor in Council by regulation to provide for the payment of contributions

by means of revenue stamps affixed to or impressed upon books or cards * * * and such stamps and the devices for impressing the same shall be prepared and issued in such manner as may be prescribed by such regulation.

By subsection 2,

* * * the Commission may make regulations providing for any matter relating to the payment and collection of contributions payable under this Act, and in particular for—

(a) regulating the manner, times and conditions, in, at and under which payments are to be made;

(b) the entry in or upon unemployment books or cards of particulars of contributions and benefits paid in respect of the persons to whom the unemployment books or cards relate;

(c) the issue, sale, custody, production and delivery up of unemployment books or cards and the replacement of unemployment books or cards which have been lost, destroyed or defaced; and

(d) the offering of reward for the return of an unemployment book or card which has been lost and for the recovery from the person responsible for the custody of the book or card at the time of its loss of any reward paid for the return thereof.

By section 31, the failure to pay any contribution which an employer or an employee is liable to pay under the Act is constituted an offence punishable by fine or imprisonment or both. By section 35 (1) it is provided:

The Minister of Finance shall from time to time deposit in the Bank of Canada, to the credit of the Commission, in an account to be called "The Unemployment Insurance Fund" (hereinafter referred to as "The Fund"), all revenue received from the sale of unemployment insurance stamps and all contributions, if any, paid otherwise than by means of such stamps (including contributions recovered by process of law) under the provisions of this part of this Act.

The Governor General in Council, by section 18 (1) is authorized to make regulations touching the payment and collection of contributions payable under the Act. This section (35 (1)) which in unqualified terms lays upon the Minister of Finance the duty to pay into the Fund "all revenue received from the sale of unemployment insurance stamps and all contributions and all contributions (if any) paid otherwise than by means of such stamps (including those recovered by process of law)" manifests very clearly the intention that the compulsory contributions shall be paid to the government and shall be recoverable by process of law; although it is left to the Governor General in Council to make specific provision by regulation for the collection and payment of such contributions.

Now let it be observed, in the first place, that on the hypothesis on which we are proceeding, if the moneys raised by these compulsory contributions are moneys raised "by any mode or system of taxation," these enactments are within the powers of Parliament, but, if the attack upon the legislation is well founded, Parliament has no authority to obtain money in this way. It would appear that, having regard to the nature of the legislative authority vested in Parliament, and to the wide discretion reposed in Parliament touching the manner in which moneys are to be raised under subdivision 3, a court ought to observe

1936
REFERENCE
re
THE
EMPLOY-
MENT AND
SOCIAL
INSURANCE
ACT.
—
Duff C.J.

1936
 {
 REFERENCE
 re
 THE
 EMPLOY-
 MENT AND
 SOCIAL
 INSURANCE
 ACT.
 Duff C.J.

a high degree of caution in pronouncing upon the invalidity of an enactment, by which moneys become by compulsion of law payable by individuals to the Dominion Treasury for a public purpose, on the ground that, in truth, it does not possess its *prima facie* character, that of a taxing statute, but is legislation intending to do what Parliament has otherwise no manner of authority to do. We are disposed to think that something approaching a demonstration ought to be required to lead one to such a conclusion.

Let it not be overlooked that we are not here dealing with an attempt on the part of Parliament to do something it has no power to do. We have not before us an attempt under the guise of taxation to regulate insurance contracts, or an attempt under the guise of criminal legislation to regulate insurance contracts, or an attempt under the guise of legislation for the regulation of mines to regulate in relation to aliens. The statute before us has nothing of that character. If we are right in what we have already said, it is entirely competent to Parliament to resort, as sources for the provision of the unemployment fund, to taxes levied on employers and employees and to taxes levied "by any mode or system" which Parliament in its discretion may adopt.

We ask ourselves then, What are the indicia in this statute which compel us to conclude that Parliament, instead of resorting to taxation which it had authority to do, has resorted to legislation in regard to civil rights which it had no authority to enact?

The essentials of taxation are present. The contributions are levied by Parliament directly. That the contributions are to be paid by revenue stamps is prescribed by Parliament; but the Governor General in Council is to regulate payment and collection. Payment is compulsory. Contributions are recoverable by process of law and failure to pay is an offence punishable by fine and imprisonment. The contributions are payable into the public treasury of the Dominion, and are to be paid by the Minister of Finance into a Fund which is to be applied as directed by Parliament.

In *Lower Mainland v. Crystal Dairy* (1) Lord Thankerton, speaking for the Judicial Committee of the Privy Council, said:—

In the opinion of their Lordships, the adjustment levies are taxes. They are compulsorily imposed by a statutory Committee consisting of three members, one of whom is appointed by the Lieutenant-Governor in Council, the other two being appointed by the dairy farmers within the district under s. 6 of the Act. They are enforceable by law, and a certificate in writing under the hand of the chairman of the Committee is to be *prima facie* evidence in all Courts that such amount is due by the dairy farmer (s. 11). A dairy farmer who fails to comply with every determination, order or regulation made by Committee under the Act is to be guilty of an offence against the Act (s. 13) and to be liable to a fine under s. 19. Compulsion is an essential feature of taxation: *City of Halifax v. Nova Scotia Car Works, Ltd.* (2). Their Lordships are of opinion that the Committee is a public authority, and that the imposition of these levies is for public purposes. Under s. 22 the Lieutenant-Governor in Council has power to suspend the functions of a Committee, if its operations are adversely affecting the interests of consumers of milk or manufactured products, and the Committee is to report annually to the Minister and to send him every three months the auditor's report on their accounts (s. 12, subs. 2, and s. 8A). The fact that the moneys so recovered are distributed as a bonus among the traders in the manufactured products market does not, in their Lordships' opinion, affect the taxing character of the levies made.

The judgment of the majority of this Court in *Lawson v. Interior Tree, Fruit and Vegetable Committee of Direction* (3) is to the same effect.

In *Workmen's Compensation Board v. C.P.R.* (4), assessments upon employers, for the purpose of providing an accident fund out of which compensation was payable by the Compensation Board to persons injured by accident in the course of their employment and to dependents in case of death, were held to fall within the denomination "direct taxation" within the meaning of section 92 (2) of the *British North America Act*.

Subsection 3 of section 17 and subsection 1 of section 33 require notice in this connection. As to the first of these enactments, the subject does not appear to admit of extended argument, but we ourselves are unable to perceive any valid reason for holding that the authority to make laws in relation to the "raising of money by any mode or system of taxation" does not embrace the authority to require "A" to pay in the first instance a tax in

1936
REFERENCE
re
THE
EMPLOY-
MENT AND
SOCIAL
INSURANCE
ACT.
Duff C.J.

(1) [1933] A.C. 168.

(3) [1931] S.C.R. 357 at 362.

(2) [1914] A.C. 992, at 998.

(4) [1920] A.C. 184.

1936
 REFERENCE
 TO
 THE
 EMPLOY-
 MENT AND
 SOCIAL
 INSURANCE
 ACT.
 Duff C.J.

respect of which "B" is liable, and to give "A" a right to reimbursement from "B" out of "B's" monies in "A's" hands, or otherwise.

As to section 33, we are disposed to think that the provision in question, although unusual, is not beyond the power of Parliament to enact as an additional means for insuring the payment of contributions by employers and the satisfactory working of the scheme. However that may be, that provision is plainly severable. It is not a necessary part of the legislative scheme. Assuming it to be *ultra vires* and to afford some evidence of an intention on the part of Parliament to legislate for regulating the relations between employer and employee, such evidence is not sufficiently powerful to deprive the legislation of its *prima facie* character, which, as we have said, is that of an enactment in respect of the subject matter of head no. 3 of section 91.

There remains the broad contention that the provisions of the statute viewed as a whole disclose a scheme under which a statutory contract arises imposing upon employers and employees a contractual duty to contribute to an insurance fund and conferring upon insured persons contractual rights to be paid unemployment benefits out of that fund when the statutory prerequisites are observed.

In *Workmen's Compensation Board v. C.P.R.* (1), it was held, as we have seen, that the assessments levied upon employers in order to provide an accident fund out of which compensation was to be paid to employees injured by accident were in the nature of taxes.

Their Lordship's Board in that case had to consider a section of the Compensation Act under which, where the accident happened on a ship or a railway outside the province, and the workman was a resident of the province, and the nature of the employment was such that the work or service performed by the workman had to be performed both within and without the province, the workman or his dependents should be entitled to recover compensation if the circumstances were such that he would have possessed such a right had the accident happened within the province. It was held that it was competent to the provincial legis-

(1) [1920] A.C. 184.

lature to give such a right of recovery in such circumstances, as a statutory condition of the contract of employment made with a workman resident within the province.

This right, it was said, arises, not out of tort, but out of the workman's statutory contract, and, it was added, their Lordships think it is a legitimate provincial object to secure that every workman resident within the province who so contracts should possess it as a benefit conferred on himself as a subject of the province.

The statute also provides that in any case where compensation was payable in respect of an accident happening elsewhere than in the province, if the employer had not contributed fully to the accident fund in respect of his workmen engaged in the service in which the accident happened, the employer should pay to the Board the full amount of the compensation payable in respect of the accident, and that the payment of this sum should be enforceable in the same manner as an assessment. As regards this provision, their Lordships observed:

* * * it also appears to them to be within the power of the province to enact that, if the employer does not fully contribute to the accident fund out of which the payment is normally to be made, the employer should make good to that fund the amount required for giving effect to the title to compensation which the workman acquired for himself and his dependents.

The question before their Lordships concerned the competence of the provincial legislature under the powers vested in it by section 92 to enact this legislation. A ship, the property of the C.P.R. Co., had been lost at sea outside Canadian territorial waters, and it was argued on behalf of the respondent company, that the right the legislature professed to give the workman in such circumstances, and the liability the legislation professed to impose upon the owner of the ship, was necessarily a right and a liability having a situs outside the province, and consequently not within the authority of the province to create, in exercise of its jurisdiction concerning "property and civil rights" within the province. This argument was based mainly, if not exclusively, upon the decision of the Judicial Committee in *Royal Bank v. The King* (1).

The judgment does not in terms state that the liability of the ship owner, where he has not fully contributed to the accident fund in respect of the employees engaged in

1936
REFERENCE
re
THE
EMPLOY-
MENT AND
SOCIAL
INSURANCE
ACT.
Duff C.J.

1936
 {
 REFERENCE
 re
 THE
 EMPLOY-
 MENT AND
 SOCIAL
 INSURANCE
 ACT.
 Duff C.J.

the service in which the accident occurred, to make good such contribution in the manner mentioned was a liability arising out of the statutory term attached to the contract. The liability to pay assessments in the first instance is treated as a liability to pay a tax. As to the special duty arising from the failure to keep up his contributions, there seems to be no reason to think it was placed upon any other footing. At p. 192 (1) their Lordships point out that the fundamental question was whether or not

a contract of employment made with persons within the province has given a title to a civil right within the province to compensation.

Their Lordships proceed,

The compensation, moreover, is to be paid by the Board and not by the individual employer concerned.

Then their Lordships observe that the C.P.R. Co., carrying on business in the province of British Columbia, is subject to the jurisdiction of the provincial legislature to enact laws within certain limits imposing civil duties upon it. There is no suggestion that the liability under this special provision is of a character different from the civil duty in respect of assessments made for the purpose of providing compensation for employees whose duties are confined to the province.

It will be observed that the real effect of the decision is that these matters—the matter of constituting an accident fund by compulsory contributions from employers carrying on business by the province and employees resident in the province, and by an optional contribution from the provincial government, for the purpose of providing accident benefits for workmen resident in the province injured in the course of their employment—that these matters may, in their provincial aspects and for the purpose of establishing such a scheme of insurance, fall within the legislative authority of the province in relation to taxation, to property and civil rights, and, it may be, in relation to matters merely local and private within the province. Such a scheme it is within the authority of any province to establish. It does not follow that it is within the authority of any province, or all the provinces combined, validly to enact the legislation or, indeed, any part of the legislation necessary to give effect to the system set up by the statute before us.

It seems to me to be impossible to escape the conclusion that those parts of the enactment which concern the compulsory contributions are provisions relating to the subject of taxation. As pointed out in the *Crystal Dairy* case (1), and as appears from *Workmen's Compensation Board v. C.P.R.* (2), the circumstance that the fund is to be distributed for the benefit of private individuals does not militate against the view that these contributions have the character of taxes. As already observed, the essentials of taxation are indubitably present. Moreover, a provincial enactment providing for such contributions to be paid by revenue stamps to the Dominion Government, and to be collected according to regulations prescribed by the Governor in Council, and to be applied by the Minister of Finance in a manner provided by the statute, would plainly be *ultra vires*. A province has, obviously, no power to pass such an enactment. The Dominion has the power if it is an enactment in relation to taxation.

It is of supreme importance at this point to keep in mind the fundamental principle governing the construction of the *British North America Act*: matters which in one aspect and for one purpose may, as subjects of legislation, fall within subdivisions of s. 92 may, in another aspect, and for another purpose, fall within section 91. A provincial legislature may require such compulsory contributions for the purpose of some scheme of unemployment insurance set up by itself in the exercise of powers of legislation which it possesses. In such a case, it would appear, from the decisions in the *Workmen's Compensation Board v. C.P.R.* (2), in the *Crystal Dairy* case (1) and in *Lawson's* case (3), that such contributions have the character of taxes; and legislation with regard to them would not, therefore, fall within the category of legislation respecting civil rights within the meaning of section 92. But, even assuming that such legislation by a province could be regarded as legislation in relation to civil rights, as adding a statutory term to contracts of employment, it would appear to be extremely difficult to classify the enactments requiring the payment of the contributions now in question as belonging to the category of legislation in relation to civil rights

1936
REFERENCE
TO
THE
EMPLOY-
MENT AND
SOCIAL
INSURANCE
ACT.
Duff C.J.

(1) [1933] A.C. 163.

(2) [1920] A.C. 184.

(3) [1931] S.C.R. 357.

1936
 REFERENCE
 re
 THE
 EMPLOY-
 MENT AND
 SOCIAL
 INSURANCE
 ACT.
 Duff C.J.

within a province, especially in view of the provisions of the statute, already mentioned, under which the Dominion Government is the payee, and the Governor in Council possesses the power to regulate payment and collection of all contributions, and all such contributions are to be applied by the Finance Minister in the manner prescribed by the statute.

We find ourselves unable to conclude that, reading these provisions as a whole, these enactments requiring compulsory payments can be considered as enactments on the subject of property and civil rights within any province or within all the provinces.

Turning now to the provisions of the statute dealing with unemployment benefits. These provisions, again, if found in a scheme of unemployment insurance set up by a province, might be regarded, as similar provisions in *Workmen's Compensation Board v. C.P.R.* (1) were regarded by the Judicial Committee, as having the effect of annexing a statutory term to contracts of employment. But one thing seems to be clear,—no single province, nor all the provinces combined, could enact this legislation in the exercise of their powers in regard to civil rights within the respective provinces. The enactments constitute directions for the application of a fund constituted by contributions out of the public funds of the Dominion and no province possesses any authority to legislate in relation to the application of such a fund.

Our conclusion, therefore, is, first, that in its main provisions this statute ought on its true construction to be sustained as a valid exercise of the powers of the Dominion Parliament under subdivisions 1 and 3 of section 91. Second, that as to many of its provisions, they are plainly outside any authority possessed by any province or all the provinces under section 92 and, in so far as they do not fall within the ambit of the subdivisions mentioned, must be embraced within the general authority of the Dominion to make laws for the peace, order and good government of Canada.

We should add that we are unable to agree with Mr. Rowell's contention that this legislation can be supported

(1) [1920] A.C. 184.

as legislation under head no. 2 of section 91, or that, in its entirety, it falls within the ambit of the residuary clause as interpreted and applied in recent decisions which are binding upon us.

To summarize:—

The aims stated in the preamble are legitimate, provided, of course, that the enactments themselves are within the ambit of the legislative powers possessed by Parliament. Reading subdivision 1 of section 91 and subdivision 3 together, the proper conclusion is that Parliament has exclusive authority to raise money by any mode or system of taxation for disposition by Parliament for any purpose for which it is competent to Parliament to apply the assets of the Dominion in virtue of subdivision 1. In effect, subdivision 1 endows the High Court of Parliament with full discretionary authority to dispose of the public assets of the Dominion, and no other court is invested with jurisdiction to examine any purported exercise of that authority with a view to pronouncing upon its validity, subject only to the rule that the courts are always entitled to determine whether, in truth, any given enactment of Parliament professing to be an exercise of a given authority is not really an enactment of that character; but one relating to a subject over which Parliament has no jurisdiction.

The provisions requiring compulsory contributions by employers and employed possess the essential elements of legislation respecting taxation. On their true construction, they have that character because, first, it would not be competent to a provincial legislature to enact them in the context in which they stand, which demonstrates that the contributions are exacted for the purpose of raising monies for exclusive disposition by Parliament; and, second, there is no adequate ground for holding that they are, either in purpose or in immediate effect, outside the ambit of the powers under subdivision 3.

So also as regards the enactments concerning the disposition of the proceeds of the levies upon employers and employed and of the contribution from the Dominion treasury. They are not enactments in respect of property and civil rights in any one province or in all of the provinces. They would not be competent as enactments by

1936
REFERENCE
re
THE
EMPLOY-
MENT AND
SOCIAL
INSURANCE
Act.
Duff C.J.

any or all of the provincial legislatures, and there is no adequate ground for affirming that these enactments are not legislation in relation to the subjects within the scope of subdivision 1.

It is hardly susceptible of dispute that Parliament could, in the legitimate exercise of its exclusive authority under subdivisions 1 and 3 of section 91, levy taxes for the purpose of raising money to constitute a fund to be expended in conformity with the directions of Parliament, in unemployment benefits, and provide for a contribution to that fund from the Dominion treasury, or to maintain that, in executing these exclusive powers, Parliament is subject to any control by the courts as to the form of the taxation or the incidence of it or as touching the manner or conditions of the payment of benefits.

It is, perhaps, not too much to say that complete discretionary authority respecting the form and incidence of taxation under subdivision 3, and respecting the disposal of all public assets under subdivision 1, are essential to enable Parliament to discharge the responsibilities entrusted to it.

In a word, legislation for raising money for disposition by Parliament under subdivision 3 of section 91, and directing the disposition of it under subdivision 1, is necessarily excluded from the jurisdiction of the provinces by the concluding words of section 91; and there is no sufficient ground for affirming that, in the enactments of this statute, Parliament is not exercising its power under these subdivisions, or, in other words, that under the guise of doing so it is invading a provincial field from which it is excluded, for the purpose of attaining a result which it has full power to attain by legislating within fields in which it has exclusive authority.

The statute is, therefore, *intra vires*.

RINFRET J. (Cannon and Kerwin JJ. concurring)—The constitutionality of the *Employment and Social Insurance Act* (see ch. 38 of the statutes of Canada, 25-26 Geo. V, assented to 28th June, 1935) was referred by the Governor

1936
REFERENCE
re
THE
EMPLOY-
MENT AND
SOCIAL
INSURANCE
ACT.
Duff C.J.
—

in Council to the Supreme Court of Canada under sec. 55 of the *Supreme Court Act*.

The statute is entitled "An Act to establish an Employment and Social Insurance Commission, to provide for a National Employment Service, for Insurance against Unemployment, for aid to Unemployed Persons, and for other forms of Social Insurance and Security, and for purposes related thereto." The preamble refers to the Treaty of Peace made between the Allied and Associated Powers and Germany, signed at Versailles on the 28th day of June, 1919. It states that it is desirable to discharge the obligations to Canadian Labour flowing from articles 23 and 427 of the Treaty, and that it is essential for the peace, order and good government of Canada to adopt such an Act for the purpose of maintaining on equitable terms interprovincial and international trade, to authorize the creation of a National Fund out of which benefits to unemployed persons throughout Canada will be payable and to provide for the levying of contributions from employers and workers for the maintaining of the said fund and for contributions thereto by the Dominion.

After making provision for the short title and the interpretation clauses, the Act is divided into five parts. Part I relates to the Employment and Social Insurance Commission, which is thereby brought into existence. Part II relates to Employment service. Part III relates to Unemployment Insurance. Part IV relates to National Health. Part V contains general provisions concerning regulations; the annual report to be submitted by the Commission; all other reports, recommendations and submissions required to be made to the Governor in Council; the disposition of fines; repeal, audit and the coming into force of the Act.

It is followed by three schedules, the first of which defines employment within the meaning of Part III of the Act and enumerates the "excepted employments." The second schedule fixes the weekly rates of contribution and establishes the rules as to payment and recovery of compulsory payments by employers on behalf of unemployed persons. The third schedule fixes the rates of unemployment benefits.

Under Part I, the Act is to be administered by a Commission consisting of three members to be called the Em-

1936
REFERENCE
re
THE
EMPLOY-
MENT AND
SOCIAL
INSURANCE
ACT.
Rinfret J.
—

1936
REFERENCE
re
THE
EMPLOY-
MENT AND
SOCIAL
INSURANCE
ACT.
Rinfret J.
—

ployment and Insurance Commission, with wide powers of investigation for assisting unemployed persons and for providing to them physical and industrial training and instruction.

Under Part II, the Commission is to organize an Employment Service for the Dominion of Canada. The Act provides for the constitution and management of such Employment service on a very large scale. Regional divisions are established. There is to be in each such division a central employment office and as many employment offices as the Commission will deem expedient and desirable for the purposes of the Act. The Commission is to have the direction, maintenance and control of all employment offices so established. The Commission may make regulations authorizing advances by way of loans towards meeting the expenses of workers travelling to places where employment has been found for them through an employment office.

Part III of the Act provides for Unemployment Insurance. The persons to be insured against unemployment are defined. The Act regulates the manner in which the funds required shall be collected partly from monies provided by Parliament, partly from contributions by employed persons and by the employers of those persons. But the employer shall, in the first instance, be liable to pay both the contribution payable by himself and also, on behalf of the employed person, the contribution payable by that person, subject to the right to recover by deduction from the wages or otherwise. The payment of contributions is to be made by means of revenue stamps affixed to or impressed upon books or cards specially prescribed for that purpose. There follows statutory conditions for the receipt of unemployment benefits. One of them is that the person insured shall not be entitled to the benefit until contributions on his behalf have been made for not less than forty full weeks. The manner in which and the conditions under which the contributions are to be paid are defined in numerous sections and subsections.

All questions concerning the rights of persons under the Act are to be determined by the Commission. The Commission may employ insurance officers in each regional division; and the Governor in Council is further authorized to designate such number of persons as are necessary

in each such division to act as umpires, deputy-umpires, courts of referees, chairmen of those courts, etc., for the purpose of examining and determining all claims for benefit, with elaborate provisions for appeal.

Then follow a number of sections dealing with penalties, legal proceedings, civil proceedings by the employee against the employer for neglect to comply with the Act, including the authorization for the Commission to institute proceedings on behalf of the employed person, or for the recovery as civil debts of sums due to the Unemployed Insurance Fund established under the Act.

Inspectors are to be appointed for the purpose of the execution of the Act with power to do all or any of several things, including the right to enter premises other than private dwellings, to make examinations and inquiries, to examine persons and to exercise such other powers as may be necessary to carry the Act into effect.

Then come the financial provisions. The revenue from the sale of the stamps and from all contributions are to be deposited from time to time in the Bank of Canada, by the Minister of Finance, to the credit of the Commission, in an account to be called "The Unemployment Insurance Fund." And in a similar way are to be deposited the monies provided by Parliament; and there is to be an Investment Committee of three members consisting of one member nominated by the Government, one by the Minister of Finance, and one by the Governor of the Bank of Canada, to look after the investment of such sums standing to the credit of the Fund as are not required to meet current expenditures.

In addition to all the above officials, there will be appointed an Advisory Committee, the duties of which are to give advice and assistance to the Commission in relation to the discharge of its functions under the Act and to make reports on the financial condition of the Fund. This Committee shall consist of a Chairman and not less than four, nor more than six, other members. Further, the Commission is given authority to make regulations relating to persons working under the same employer partly in insurable employment and partly in other occupations; also for prescribing the evidence to be required as to the fulfilment of the conditions for receiving unemployment benefits; for

1936
REFERENCE
re
THE
EMPLOY-
MENT AND
SOCIAL
INSURANCE
ACT.
Rinfret J.

1936
REFERENCE
re
THE
EMPLOY-
MENT AND
SOCIAL
INSURANCE
ACT.
Rinfret J.

prescribing the manner in which claims for unemployment benefit may be made, the proceedings to be followed in the consideration and examination of claims; and also regulations with respect to the references to the central or local committees, and to persons employed on night work and to penalties for the violation of any regulation.

Under Part IV, the duties and powers of the Commission are defined with respect to its co-operation in matters of health and health insurance. It may undertake special investigations in regard thereto, subject to the approval of the Governor in Council.

The weekly rates of contribution provided for under the second schedule are graduated according to the class and the wages of the employed person. The weekly contributions are made payable for each calendar week during the whole or any part of which an employed person has been employed by an employer. The payment of contributions both by the employer and by the employee is compulsory. All conditions prescribed for the payment of these contributions including the right of the employer to recover from the employed person the amount of any contributions paid by him on behalf of the employed person are made essential and necessary conditions of the contract of engagement between the employer and the employee. In fact, Part II of the second schedule contains any number of these conditions and provides for further regulations which may be made by the Commission in connection therewith.

The Court is asked to give its opinion upon the question whether the Act, or any of the provisions thereof, is *ultra vires* of the Parliament of Canada.

The written submission of the Attorney-General of Canada was that the Act in its entirety was within the legislative power of the Parliament of Canada in virtue of

- (1) its residuary power to make laws for the peace, order and good government of Canada, and
- (2) its exclusive power (a) to regulate trade and commerce, (b) to raise money by any mode or system of taxation, (c) to appropriate public money for any public purposes, (d) to provide for the collection of statistics; and, incidentally, (e) to enact criminal laws.

It is unnecessary for me to add anything to what has already been said—and so well been said—by my Lord

the Chief Justice in connection with the other References made to the Court at the same time as the present one (more particularly those concerning the *Natural Products Marketing Act*, 1934 (p. 403), and the *Dominion Trade and Industry Commission Act*, 1935 (p. 381), to indicate the reasons why I think that the validity of this legislation cannot be supported as an exercise of the residuary power to make laws for the peace, order and good government of Canada, or as an exercise of the power to regulate trade and commerce.

Insurance of all sorts, including insurance against unemployment and health insurances, have always been recognized as being exclusively provincial matters under the head "Property and Civil Rights," or under the head "Matters of a merely local or private nature in the Province." By force of the *British North America Act*, the power to make laws for the peace, order and good government of Canada is given to the Dominion Parliament only "in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces."

The exercise of legislative power by the Parliament of Canada in regard to all matters not enumerated in section 91 was, by more than one pronouncement of the Judicial Committee of the Privy Council, declared to be "strictly confined to such matters as are unquestionably of Canadian interest and importance" (*Attorney General for Ontario v. Attorney General for Canada*) (1); it will be recognized by the Courts "only after scrutiny sufficient to render it clear that circumstances are abnormal . . . such as cases of war or famine" (2); and "instances of these cases . . . are highly exceptional" (3).

In this particular matter, there is no evidence of an emergency amounting to national peril; but, moreover and still more important, the statute is not meant to provide for an emergency. It is not, on its face, intended to cope with a temporary national peril; it is a permanent statute dealing with normal conditions of employment. There was accordingly here no occasion, nor foundation, for the exercise of the residuary power.

(1) [1896] A.C. 348.

(2) [1922] 1 A.C. 200.

(3) [1923] A.C. 695; [1925] A.C. 396.

1936
REFERENCE
TO
THE
EMPLOY-
MENT AND
SOCIAL
INSURANCE
ACT.
Rinfret J.

Nor is this legislation for the regulation of trade and commerce. It is not trade and commerce as defined by the Privy Council in its numerous decisions upon the subject. It deals with a great many matters which are trade and commerce in no sense of the word, such as the contract of employment, employment service, unemployment insurance and benefit, and health.

The proposition that the Act could be supported in virtue of the powers of the Dominion Parliament derived from Head 6 (Statistics), or Head 27 (Criminal Law) of section 91 need not retain our attention and it was not pressed at the argument.

It may be stated further that the legislation is not based on the Treaty of Peace, although it is referred to in the preamble. In fact, counsel for the Attorney General of Canada positively stated at bar that he was not relying on any treaty or on section 132 of the *British North America Act*.

There remains, therefore, in the submission made on behalf of the Dominion Government, only two heads that have to be considered in support of the legislation; and they are: "the power to raise money by any mode or system of taxation" (91-3), and "the power to appropriate public moneys for any public purpose."

In truth, these powers were only faintly advanced by counsel for the Dominion in favour of the legislation. Nevertheless, they were referred to, and more particularly as I understand that they were accepted in support of the validity of the Act by my Lord the Chief Justice, I realize that my reasons for holding a different view must be explained as fully, though as concisely, as possible.

The critical question is whether or not the statute is, in its substance, an exercise of those powers to raise money by taxation and to make laws for the disposal of the public property.

At the outset, let us remember the remark of Lord Coke (4 Inst. 330) that the preamble of a statute is "the key to open the minds of the makers of the Act and the mischiefs which they intended to remedy."

The recitals of the preamble have already been referred to. They mention the Treaty of Versailles and the promise of the signatories to endeavour to secure and maintain

fair and humane conditions of labour for industrial wage earners. They indicate the desirability of discharging certain obligations to Canadian Labour. They invoke the importance for the peace, order and good government of Canada to provide for a National employment service, for insurance against unemployment and for other forms of social insurance. They allege the necessity of maintaining on equitable terms interprovincial and international trade. They mention the purpose of creating a national fund, out of which benefits to unemployed persons throughout Canada will be payable, and of providing for the levy of contributions from employers and workers for the maintaining of this fund and for contribution thereto by the Dominion.

With deference, it seems to me that these recitals clearly indicate that the Parliament of Canada intended primarily to legislate with regard to employment service, to unemployment insurance, and to health matters; that it was not concerned with the public debt and property or with the raising of money by taxation; and that the provisions for levying contributions for the creation of the national fund were nothing more than provisions to enable the carrying out of the true and only purposes of the legislation. The Act is one dealing with and regulating employment service and unemployment insurance. The contributions (or the taxes, if we are to call them so) are mere incidents of the regulation.

It is hardly necessary to repeat that, when investigating whether an Act was competently passed by Parliament, the courts must ascertain the "true nature and character" of the enactment, its "pith and substance," and the legislation must be "scrutinized in its entirety" for the purpose of determining within which of the categories of subject-matters mentioned in sections 91 and 92 the legislation falls (*Citizens Insurance Co. v. Parsons* (1); *Union Colliery Company v. Bryden* (2); *Great West Saddlery Company v. The King* (3); *Reciprocal Insurers* case (4); *Toronto Electric Commissioners v. Snider* (5).

1936
REFERENCE
re
THE
EMPLOY-
MENT AND
SOCIAL
INSURANCE
ACT.
Rinfret J.
—

(1) (1881) 7 App. Cas. 96.

(3) [1921] 2 A.C. 91, at 117.

(2) [1899] A.C. 580.

(4) [1924] A.C. 328, at p. 337.

(5) [1925] A.C. 396, at p. 407.

1936

REFERENCE

TO

THE

EMPLOY-

MENT AND

SOCIAL

INSURANCE

ACT.

Rinfret J.

In my humble view, the subject-matter of the Act is employment service and social insurance, not public debt and property or taxation. The object of the Act, the end sought to be accomplished by it is a scheme for employment service and unemployment insurance; the contributions levied from the employers and employees are only incidents of the proposed scheme, and, in fact, merely means of carrying it into effect. The Act does not possess the character of a taxing statute, but it is legislation intending to do precisely what the title says: to establish an employment insurance commission, to provide for a national employment service, for insurance against unemployment, for aid to unemployed persons, or other forms of social insurance and security and for purposes related thereto.

It being well understood and, in fact, conceded that these are subject-matters falling within the legislative authority of the provinces, the Dominion Parliament may not, under pretext of the exercise of the power to deal with its property, or to raise money by taxation, indirectly accomplish the ends sought for in this legislation. If it were otherwise, the Dominion Parliament, under colour of the taxing power, would be permitted to invade almost any of the fields exclusively reserved by the Constitution to the legislatures in each province.

One of the effects of the Act under submission is, in the language of Lord Haldane, in *Workmen's Compensation Board v. C.P.R.* (1), "to attach statutory terms to contracts of employment," and to impose contractual duties as between employers and employees. In its immediate result, the Act creates civil rights as between the former and the latter.

I doubt whether the contribution received from the employee can properly be described as a tax. In fact, it would seem to me to partake more of the nature of an insurance premium or of a payment for services and individual benefits which are to be returned to the employee in proportion to his payments. Be that as it may under all circumstances, the benefits conferred on the employees by the Act are not gifts with conditions attached, which

the employers are free to accept or not; the conditions attached to the benefits are made compulsory terms of all contracts in the specified employments, and I deprecate the idea that the Dominion Parliament may use its power of taxation to compel the insertion of conditions of that character in ordinary contracts between employers and employees.

It may be that some of the provisions of the Act are not open to objection. But I fail to see how they can be severed from the general scheme organized under the Act or from the powers conferred on the Commission; and the legislation as it stands must undoubtedly fall as a whole.

In the premises, the Act submitted to the Court is not a mere encroachment on the provincial fields through the exercise of powers allegedly ancillary or incidental to one of the enumerated powers of section 91; in its pith and substance, it is a direct and unwarranted appropriation of the powers attributed to the legislatures by force of section 92 of the Constitution.

For these reasons, and also for the reasons given by my brother Kerwin, with whom I entirely concur, I have come to the conclusion that the *Employment and Social Insurance Act* (chapter 38 of the statutes of Canada, 25-26 Geo. V) is wholly *ultra vires* of the Parliament of Canada.

CROCKET J.—For the reasons given by my brother Rinfret, I agree that the above statute is wholly *ultra vires* of the Parliament of Canada.

KERWIN J. (Rinfret and Cannon JJ. concurring).—The Governor General in Council has referred to this Court for hearing and consideration pursuant to section 55 of the *Supreme Court Act* the following question: "Is the *Employment and Social Insurance Act*, or any of the provisions thereof and in what particular or particulars or to what extent, *ultra vires* of the Parliament of Canada?"

Section 1 of the Act merely gives its short title; section 2 is the interpretation section, while section 3 provides that the remainder of the Act may be referred to as follows:

1936
REFERENCE
re
THE
EMPLOY-
MENT AND
SOCIAL
INSURANCE
ACT.

Rinfret J.

1936
 ~~~~~  
 REFERENCE  
*re*  
 THE  
 EMPLOY-  
 MENT AND  
 SOCIAL  
 INSURANCE  
 ACT.  
 ———  
 Kerwin J.

PART I, sections four to nine inclusive, relating to the Employment and Social Insurance Commission;

PART II, sections ten to fourteen inclusive relating to Employment Service;

PART III, sections fifteen to thirty-eight inclusive relating to Unemployment Insurance;

PART IV, sections thirty-nine to forty-one inclusive relating to National Health;

PART V, sections forty-two to forty-eight inclusive, General.

The sections included in Part II provide that The Employment and Social Insurance Commission constituted under Part I shall organize an employment service for the Dominion of Canada, and contain supplementary provisions for the collection of information, advances to workers seeking employment, etc.

The sections included in Part IV enact that the duties and powers of the Commission under that Part shall be exercised so far as may be found practicable and expedient in co-operation with any department or departments of the Government of Canada, with the Dominion Council of Health, with any province or any number of provinces collectively, or with any municipality or any number of municipalities collectively, or with associations or corporations, and provide that it shall be the duty of the Commission to assemble reports, publications, etc., concerning certain schemes or plans for medicinal, dental or surgical care, including medicines, drugs or hospitalization, or compensation for loss of earnings arising out of ill-health, accident or disease.

By themselves the provisions of Part II and of certain portions of Parts IV and V might be unobjectionable but in my opinion they are so inextricably interwoven with the powers of the Commission set up under Part I and with the scheme of unemployment insurance referred to in Part III that they must stand or fall according to the validity or otherwise of sections 15 to 38 inclusive which form Part III.

As to Part III serious questions arise. In addition to the arguments of counsel, I have had the advantage of reading the opinion of My Lord the Chief Justice but with deference I find myself unable to agree with the conclusions

expressed therein that this Part of the Act may be justified as an exercise by Parliament of its powers under Head 1 "The Public Debt and Property" and Head 2 "The Raising of money by any mode or system of taxation" of section 91 of the *British North America Act*, 1867. It is quite true that Parliament, by properly framed legislation may raise money by taxation and dispose of its public property in any manner that it sees fit. As to the latter point, it is evident that the Dominion may grant sums of money to individuals or organizations and that the gift may be accomplished by such restrictions and condition as Parliament may see fit to enact. It would then be open to the proposed recipient to decline the gift or to accept it subject to such conditions. As to the first point, it is also undoubted, I conceive, that Parliament, by properly framed legislation may raise money by taxation, and this may be done either generally or for the specific purpose of providing the funds wherewith to make grants either before or after the conferring of the benefit.

But in my view, after a careful consideration of all the sections in Part II of the Act, in substance Parliament does not purport to do either of these things. Section 15 provides that the designated persons, referred to as "unemployed persons" shall be insured against unemployment in the manner provided for by the Act. Section 17 enacts that the funds required for providing "unemployment benefit" and for making any other payments which are to be made out of the Unemployment Insurance Fund established later under Part III shall be derived partly from moneys provided by Parliament, partly from contributions from employed persons and partly from contributions from employers of those persons, which contributions shall be paid by means of revenue stamps or otherwise as may be prescribed by the Commission. Rates of contribution are set forth in the second schedule to the Act, and by ss. 3 of s. 17 except where regulations under the Act otherwise prescribe, the employer shall in the first instance be liable to pay both the contribution payable by himself and also the contribution payable by the employed person with power to the employer, subject to regulations, to recover from the employed persons to the amount of the contributions so paid on behalf of the latter by the employer. By

1936  
REFERENCE  
TO  
THE  
EMPLOY-  
MENT AND  
SOCIAL  
INSURANCE  
ACT.  
Kerwin J.

1936  
REFERENCE  
re  
THE  
EMPLOY-  
MENT AND  
SOCIAL  
INSURANCE  
ACT.  
Kerwin J.

section 19 every unemployed insured person who complies with prescribed "statutory conditions" is entitled to receive what is known as an "unemployment benefit." There is a provision by which certain employed persons may be exempted from the provisions of the Act, but subject to that, the individuals covered by this Part are obliged to become insured by means of a statutory condition attached to the contract of employment.

While there are numerous other provisions, I believe I have correctly set forth the marrow of Part III of the Act and I am unable to ascertain in what manner they may be termed an exercise of the power conferred upon Parliament to tax. It occurs to me that if it were otherwise the Parliament of Canada might in connection with any matter whatsoever, by the mere imposition of a tax, confer upon itself authority to legislate upon matters over which the legislature of each province would ordinarily have jurisdiction. This must be understood, of course, as not referring to any power in the legislatures of the various provinces to originate or assist its local scheme by indirect taxation.

That, with this qualification, the subject matter of Part III would ordinarily fall within the ambit of the powers of the provinces within their respective boundaries was not, I think seriously disputed. It deals with contracts of employment and attaches thereto a statutory condition. It interferes with property and civil rights. A reference particularly to section 15 and to the recitals in the Act indicates that the very pith and substance of this part of the Act deals with unemployment insurance.

*In re The Insurance Act of Canada* (1) was an appeal from the judgment of the Court of King's Bench (Appeal Side) for the Province of Quebec in answer to the following questions referred to that Court by the Lieutenant-Governor in Council of the Province:

1. Is a foreign or British insurer who holds a licence under the Quebec Insurance Act to carry on business within the Province obliged to observe and subject to ss. 11, 12, 65 and 66 of the Insurance Act of Canada, or are these sections unconstitutional as regards such insurer?

2. Are ss. 16, 20 and 21 of the Special War Revenue Act within the legislative competence of the Parliament of Canada? Would there be any difference between the case of an insurer who has obtained or is bound



to obtain under the Provincial law a licence to carry on business in the Province and any other case?

In delivering the judgment of their Lordships, Viscount Dunedin after referring to *Attorney-General for Canada v. Attorney-General for Alberta* (1), and stating that that decision conclusively and finally settled that regulations as to the carrying on of insurance business were a provincial and not a Dominion matter, concluded: "It really only carried to their logical conclusion the two cases already cited"; the two cases being *Citizens Insurance Company v. Parsons* (2) and *John Deere Plow Company's case* (3). He then discussed the *Reciprocal Insurers* case (4), pointing out that the Board had there decided that section 508C of the Criminal Code was not a genuine amendment of the criminal law, but was really an attempt by a soi-disant amendment of the criminal law to subject insurance business in the Province to the control of the Dominion—that which had exactly been determined to be *ultra vires* the Dominion by the judgment of 1916. Their Lordships therefore in the 1931 case decided that the first part of question 1 should be answered in the negative. They then proceeded to the second question and quoted the only section of the *Special War Revenue Act* that in their opinion needed to be considered. That section was as follows:

16. Every person resident in Canada, who insures his property situate in Canada, or any property situate in Canada in which he has an insurable interest, other than that of an insurer of such property, against risks other than marine risks: (a) with any British or foreign company or British or foreign underwriter or underwriters, not licensed under the provisions of the Insurance Act, to transact business in Canada; or (b) with any association of persons formed for the purpose of exchanging reciprocal contracts of indemnity upon the plan known as inter-insurance and not licensed under the provisions of the Insurance Act, the chief place of business of which association or of its principal attorney-in-fact is situate outside of Canada; shall on or before the thirty-first day of December in each year pay to the Minister, in addition to any other tax payable under any existing law or statute a tax of five per centum of the total net cost to such person of all such insurance for the preceding calendar year.

The judgment continues:

Now as to the power of the Dominion Parliament to impose taxation there is no doubt. But if the tax as imposed is linked up with an object which is illegal the tax for that purpose must fall.

On page 53 Viscount Dunedin quoted the following extract from the judgment of the Board in the *Reciprocal Insurers'* case (4):

In accordance with the principle inherent in these decisions their Lordships think it is no longer open to dispute that the Parliament of

1936  
REFERENCE  
re  
THE  
EMPLOY-  
MENT AND  
SOCIAL  
INSURANCE  
ACT.  
Kerwin J.  
—

(1) [1916] 1 A.C. 588.

(3) [1915] A.C. 330.

(2) [1881] 7 A.C. 96.

(4) [1924] A.C. 328.

1936  
 ~~~~~  
 REFERENCE
 re
 THE
 EMPLOY-
 MENT AND
 SOCIAL
 INSURANCE
 ACT.

Kerwin J.
 ———

Canada cannot, by purporting to create penal sections under s. 91, head 27, appropriate to itself exclusively a field of jurisdiction in which, apart from such a procedure, it could exert no legal authority, and that if, when examined as a whole, legislation in form criminal is found, in aspects and for purposes exclusively within the Provincial sphere, to deal with matters committed to the Provinces, it cannot be upheld as valid.

He then continued:—

If instead of the words "create penal sanctions under s. 91, head 27" you substitute the words "exercise taxation powers under s. 91, head 3," and for the word "criminal" substitute "taxing," the sentence expresses precisely their Lordships' views.

If this be the case where the Court decides that Parliament has colourably invaded the field of provincial jurisdiction, how much more cogent is the reasoning if one comes to the conclusion that the legislation in question does not even purport to be a taxing Act.

In the present reference that is the conclusion to which I am impelled and it follows that in my view Part III may not be justified under either of the heads of section 91 of the *British North America Act* to which I have referred. For the reasons already given the remainder of the Act is in the same position.

Elsewhere in his consideration of other Acts referred at this time to this Court, my Lord the Chief Justice has dealt exhaustively with the powers of Parliament under the residuary clause of s. 91 of the *British North America Act* and also with the powers of the Dominion under head 2, "The Regulation of Trade and Commerce," of that section. It is unnecessary, therefore, for me to refer to the decisions and I content myself with expressing the opinion that even if the object aimed at by Part III of the present Act may be praiseworthy and if the desired result might better be obtained by the Dominion than all or some of the provinces acting within their constitutional limitations might accomplish, the matter is not translated from the jurisdiction of the provincial legislature to that of Parliament. In the same way I am unable to see how, in view of the summary of the powers of the Dominion with reference to trade and commerce also given elsewhere by the learned Chief Justice, the matter could be considered as falling within that head of section 91.

For these reasons, and for the reasons given by my brother Rinfret which I have had the opportunity of perusing, I have come to the conclusion that the Act *in toto* is *ultra vires* of the Parliament of Canada.

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL,
DELIVERED THE 28th JANUARY, 1937

IN THE MATTER of a Reference as to whether the Parliament of
Canada had legislative jurisdiction to enact the Employment
and Social Insurance Act of the Statutes of Canada, 1935

THE ATTORNEY-GENERAL OF CANADA

Appellant

v.

THE ATTORNEY-GENERAL OF ONTARIO AND OTHERS

Respondents

Present at the Hearing:

Lord ATKIN.

Lord THANKERTON.

Lord MACMILLAN.

Lord WRIGHT (Master of the Rolls).

Sir SIDNEY ROWLATT.

(Delivered by Lord Atkin.)

This is an appeal from the judgment of the Supreme Court, delivered on 17th June, 1936, in the matter of a reference by the Governor General in Council dated 5th November, 1935, asking whether the Employment and Social Insurance Act, 1935, was *ultra vires* of the Parliament of Canada. The majority of the Supreme Court, Rinfret, Cannon, Crocket and Kerwin JJ. answered the question in the affirmative, the Chief Justice and Davis J. dissenting. The Act in its preamble recited Article 23 of the Treaty of Peace, by which in the Covenant of the League of Nations the members of the League agreed that they would endeavour to maintain fair and humane conditions of labour (omitting, however, in the recital that this agreement was subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed), and Article 427 of the said treaty, by which it was declared that the well-being, physical, moral and intellectual, of industrial wage earners, was of supreme international importance. It then recited that it was desirable to discharge the obligations to Canadian labour

assumed under the provisions of the said treaty; and that it was essential for the peace, order and good government of Canada to provide for a national employment service and insurance against unemployment, etc. It consists of five parts, Employment and Social Insurance Commission (sections 4-9), Employment Service (sections 10-14), Unemployment Insurance (sections 15-38), National Health (sections 39-41) and General (sections 42-48). In substance the Act provides for a system of Compulsory unemployment insurance. Part I sets up a commission charged with administering the Act and obtaining information and making proposals to the Governor in Council for making provision for the assistance of persons during unemployment who would not be entitled to unemployment insurance benefit under Part III. Part II provides for the organization by the commission of employment offices similar to the labour exchanges in the United Kingdom. Part III provides for unemployment insurance, while Part IV merely provides that the commission shall co-operate with other authorities in the Dominion or Provinces and shall collect information concerning any plan for providing medical care or compensation in cases of ill-health. Part V provides for regulations and reports. There are three schedules. The first defines employment within the meaning of Part III and excepted employments which include employment in agriculture and forestry, in fishing, and in lumbering and logging. The second enacts the weekly rates of contribution and rules as to payment and recovery of contributions paid by employers on behalf of employed persons. The third enacts the rates of unemployment benefit and supplementary provisions concerning the payment of unemployment benefit.

The substance of the Act is contained in the sections constituting Part III. They set up a now familiar system of unemployment insurance under which persons engaged in employment as defined in the Act are insured against unemployment. The funds required for making the necessary payments are to be provided partly from money provided by Parliament, partly from contributions by employed persons and partly from contributions by the employers of those persons. The two sets of contributions are to be paid by revenue stamps. Every employed person and every employer is to be liable to pay contributions in accordance with the provisions of the second schedule, the employer being liable to pay both contributions in the first instance, recovering the employed person's share by deduction from his wages, or if necessary in certain cases by action.

There can be no doubt that *prima facie* provisions as to insurance of this kind, especially where they affect the contract of employment, fall within the class of property and civil rights in the Province, and would be within the exclusive competence of the Provincial Legislature. It was sought, however, to justify the validity of Dominion legislation on grounds which their Lordships on consideration feel compelled to reject. Counsel did not seek to uphold the legislation on the ground of the treaty-making power. There was no treaty or labour convention which imposed any obligation upon Canada to pass this legislation, and the decision on this question in the reference on the three labour Acts does not apply. A strong appeal, however, was made on the ground of the special importance of unemployment insurance in Canada at the time of and for some time previous to the passing of the Act. On this point it becomes unnecessary to do more than to refer to the judgment of this Board in the reference on the three labour Acts and to the judgment of the Chief Justice in the Natural Products Marketing Act which on this matter the Board have approved and adopted. It is sufficient to say that the present Act does not purport to deal with any special emergency. It founds itself in the preamble on general world-wide conditions referred to in the Treaty of Peace: it is an Act whose operation is intended to be permanent: and there is agreement between all the members of the Supreme Court that it could not be supported upon the suggested existence of any special emergency. Their Lordships find themselves unable to differ from this view.

It only remains to deal with the argument which found favour with the Chief Justice and Davis J. that the legislation can be supported under the enumerated heads, 1 and 3 of section 91 of the B.N.A. Act, 1867. (1) The public debt and property, namely (3) The raising of money by any mode or system of taxation. Shortly stated the argument is that the obligation imposed upon employers and persons employed is a mode of taxation; that the money so raised becomes public property and that the Dominion have then complete legislative authority to direct that the money so raised, together with assistance from money raised by general taxation, shall be applied in forming an insurance fund and generally in accordance with the provisions of the Act.

That the Dominion may impose taxation for the purpose of creating a fund for special purposes and may apply that fund for making contributions in the public interest to individuals, corporations or public authorities could not as a general proposition be denied. Whether in such an Act as the present, compulsion applied

to an employed person to make a contribution to an insurance fund out of which he will receive benefit for a period proportionate to the number of his contributions is in fact taxation, it is not necessary finally to decide. It might seem difficult to discern how it differs from a form of compulsory insurance, or what the difference is between a statutory obligation to pay insurance premiums to the State, or to an insurance company. But assuming that the Dominion has collected by means of taxation a fund, it by no means follows that any legislation which disposes of it is necessarily within Dominion competence.

It may still be legislation affecting the classes of subjects enumerated in section 92, and, if so, would be *ultra vires*. In other words, Dominion legislation, even though it deals with Dominion property, may yet be so framed as to invade civil rights within the Province: or encroach upon the classes of subjects which are reserved to provincial competence. It is not necessary that it should be a colourable device, or a pretence. If on the true view of the legislation it is found that in reality in pith and substance the legislation invades civil rights within the Province or in respect of other classes of subjects otherwise encroaches upon the provincial field, the legislation will be invalid. To hold otherwise would afford the Dominion an easy passage into the provincial domain. In the present case their Lordships agree with the majority of the Supreme Court in holding that in pith and substance this Act is an insurance Act affecting the civil rights of employers and employed in each Province, and as such is invalid. The other parts of the Act are so inextricably mixed up with the insurance provisions of Part III that it is impossible to sever them. It seems obvious also that in its truncated form, apart from Part III, the Act would never have come into existence. It follows that the whole Act must be pronounced *ultra vires*, and in accordance with the view of the majority of the Supreme Court their Lordships will humbly advise His Majesty that this appeal be dismissed.

2

IN THE MATTER of a Reference as to whether the
Parliament of Canada had legislative jurisdiction
to enact Section 498A of the Criminal Code, being
Chapter 56 of the Statutes of Canada, 1935.

TEXTS of Section 498A of the Criminal
Code and of the Judgments pronounced by
the Supreme Court of Canada and by the
Judicial Committee of His Majesty's Privy
Council.



OTTAWA
J. O. PATENAUDE, I.S.O.
PRINTER TO THE KING'S MOST EXCELLENT MAJESTY
1937

IN THE MATTER of a Reference as to whether the Parliament of Canada had legislative jurisdiction to enact Section 498A of the Criminal Code, being Chapter 56 of the Statutes of Canada, 1935.

TEXTS of Section 498A of the Criminal Code and of the Judgments pronounced by the Supreme Court of Canada and by the Judicial Committee of His Majesty's Privy Council.



OTTAWA
J. O. PATENAUDE, I.S.O.
PRINTER TO THE KING'S MOST EXCELLENT MAJESTY
1937

IN THE MATTER of a Reference as to whether the Parliament of Canada had legislative jurisdiction to enact Section 498A of the Criminal Code, being Chapter 56 of the Statutes of Canada, 1935.

INDEX

	PAGE
Section 498A of the Criminal Code.....	5
Judgment of the Supreme Court of Canada.....	7
Judgment of the Privy Council.....	23

STATUTES OF CANADA, 1935

CHAPTER 56

An Act to amend the Criminal Code.

[Assented to 5th July, 1935.]

HIS Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

* * * * *

9. The said Act is further amended by inserting after section four hundred and ninety-eight, the following section:—

“498A. (1) Every person engaged in trade or commerce or industry is guilty of an indictable offence and liable to a penalty not exceeding one thousand dollars or to one month’s imprisonment, or, if a corporation, to a penalty not exceeding five thousand dollars, who

Discrimination
in trade.

(a) is a party or privy to, or assists in, any transaction of sale which discriminates, to his knowledge, against competitors of the purchaser in that any discount, rebate or allowance is granted to the purchaser over and above any discount, rebate or allowance available at the time of such transaction to the aforesaid competitors in respect of a sale of goods of like quality and quantity;

The provisions of this paragraph shall not, however, prevent a co-operative society returning to producers or consumers, or a co-operative wholesale society returning to its constituent retail members, the whole or any part of the net surplus made in its trading operations in proportion to purchases made from or sales to the society;

Exceptions.

(b) engages in a policy of selling goods in any area of Canada at prices lower than those exacted by such seller elsewhere in Canada, for the purpose of destroying competition or eliminating a competitor in such part of Canada;

Lower prices
in particular
area.

(c) engages in a policy of selling goods at prices unreasonably low for the purpose of destroying competition or eliminating a competitor.”

Lower prices
to destroy
competition.

* * * * *

JUDGMENT OF THE SUPREME COURT OF CANADA

(1936)
S.C.R. 363.
* Jan. 15,
16, 17.
* June 17.

IN THE MATTER OF A REFERENCE AS TO WHETHER THE PARLIAMENT OF CANADA HAD LEGISLATIVE JURISDICTION TO ENACT SECTION 498A OF THE CRIMINAL CODE, BEING CHAPTER 56 OF THE STATUTES OF CANADA, 1935.

Constitutional law—Section 498A Cr. C.—Persons engaged in trade or commerce or industry—Certain acts by them declared to be criminal offences—Whether section is intra vires of Parliament of Canada—Whether subsection (a) encroaches upon legislative authority of the provinces—B.N.A. Act, ss. 91, 92.

Subsections (a), (b) and (c) of section 498A of the Criminal Code, which enact that “every person engaged in trade or commerce or industry is guilty of an indictable offence and liable” to punishment in respect thereof who does any of the acts or series of acts denoted by these subsections, are *intra vires* of the Parliament of Canada, being enactments creating criminal offences in exercise of the powers vested in Parliament in virtue of the 27th head of section 91 of the B.N.A. Act (Criminal law). Cannon and Crocket JJ. dissenting as to subsection (a).

Per Cannon and Crocket JJ.—Subsection (a) deals directly with matters of civil rights and describes an act which lacks every element of what is ordinarily associated with criminal law. Its incorporation in the Criminal Code is a mere colourable attempt on the part of the Parliament of Canada to encroach upon the legislative authority of the provinces.

REFERENCE by His Excellency the Governor General in Council to the Supreme Court of Canada in the exercise of the powers conferred by s. 55 of the *Supreme Court Act* (R.S.C. 1927, c. 35), of the following question: Is section 498A of the Criminal Code, or any or what part or parts of the said section *ultra vires* of the Parliament of Canada?

The Order in Council referring the question to the Court is as follows:

The Committee of the Privy Council have had before them a report, dated 30th October, 1935, from the Minister of Justice, referring to an Act to amend the Criminal Code, being chapter 56 of the Statutes of Canada, 1935, and in particular to section 9 of the said Act, whereby the Criminal Code was amended by inserting therein after section 498 the following section:

“498A. Every person engaged in trade or commerce or industry is guilty of an indictable offence and liable to a

* **PRESENT:**—Duff C.J. and Rinfret, Cannon, Crocket, Davis and Kerwin JJ.

1936
 REFERENCE
 re
 SECTION
 498A
 OF THE
 CRIMINAL
 CODE.
 —

penalty not exceeding one thousand dollars or to one month's imprisonment, or if a corporation, to a penalty not exceeding five thousand dollars, who

- (a) is a party or privy to, or assists in, any transaction or sale which discriminates, to his knowledge, against competitors of the purchaser in that any discount, rebate or allowance is granted to the purchaser over and above any discount, rebate or allowance available at the time of such transaction to the aforesaid competitors in respect of a sale of goods of like quality and quantity;

The provisions of this paragraph shall not, however, prevent a co-operative society returning to producers or consumers, or a co-operative wholesale society returning to its constituent retail members, the whole or any part of the net surplus made in its trading operations in proportion to purchases made from or sales to the society;

- (b) engages in a policy of selling goods in any area of Canada at prices lower than those exacted by such seller elsewhere in Canada, for the purpose of destroying competition or eliminating a competitor in such part of Canada;

- (c) engages in a policy of selling goods at prices unreasonably low for the purpose of destroying competition or eliminating a competitor."

The Minister observes that said section 498A was enacted for the purpose of giving effect to certain recommendations contained in the Report of the Royal Commission on Price Spreads but that doubts exist or are entertained as to whether the Parliament of Canada had legislative jurisdiction to enact this section, in whole or in part, and that it is expedient that such question should be referred to the Supreme Court of Canada for judicial determination.

The Committee, accordingly, on the recommendation of the Minister of Justice, advise that the following question be referred to the Supreme Court of Canada, for hearing and consideration, pursuant to section 55 of the *Supreme Court Act*:

Is said section 498A of the Criminal Code, or any or what part or parts of the said section, *ultra vires* of the Parliament of Canada?

E. J. LEMAIRE,
 Clerk of the Privy Council

**N. W. Rowell K.C., Louis St-Laurent K.C., and C. P. Plaxton K.C.* for the Attorney-General of Canada.

A. W. Roebuck K.C. (Attorney-General) and *I. A. Humphries K.C.* for Ontario.

Charles Lanctot K.C. and *Aimé Geoffrion K.C.* for the Attorney-General of Quebec.

D. V. White for the Attorney-General of New Brunswick.

G. McG. Sloan K.C. (Attorney-General) and *J. W. deB. Farris K.C.* for British Columbia.

J. Allen K.C. for the Attorney-General of Manitoba.

W. S. Gray K.C. for the Attorney-General of Alberta.

S. Quigg for the Attorney-General of Saskatchewan.

The judgment of Duff C.J. and Rinfret, Davis and Kerwin JJ. was delivered by

DUFF C.J.—Section 498A, the validity of which is in question, is in these terms:

498A. (1) Every person engaged in trade or commerce or industry is guilty of an indictable offence and liable to a penalty not exceeding one thousand dollars or to one month's imprisonment or, if a corporation, to a penalty not exceeding five thousand dollars, who

(a) is a party or privy to, or assists in, any transaction of sale which discriminates, to his knowledge, against competitors of the purchaser in that any discount, rebate or allowance is granted to the purchaser over and above any discount, rebate or allowance available at the time of such transaction to the aforesaid competitors in respect of a sale of goods of like quality and quantity;

The provisions of this paragraph shall not, however, prevent a co-operative society returning to producers or consumers, or a co-operative wholesale society returning to its constituent retail members, the whole or any part of the net surplus made in its trading operations in proportion to purchases made from or sales to the society;

(b) engages in a policy of selling goods in any area of Canada at prices lower than those exacted by such seller elsewhere in Canada, for the purpose of destroying competition or eliminating a competitor in such part of Canada;

(c) engages in a policy of selling goods at prices unreasonably low for the purpose of destroying competition or eliminating a competitor.

This section in substance declares that everybody is guilty of an indictable offence and liable to punishment in respect thereof who does any of the acts or series of acts denoted by subsections (a), (b) and (c). We see no good reason for denying the authority of Parliament, under subdivision 27 of section 91 of the B.N.A. Act, to pass these enactments.

Reporter's note: Same counsel also appeared at the argument of all the other References reported.

1936
 {
 REFERENCE
 re
 SECTION
 498A
 OF THE
 CRIMINAL
 CODE.
 Duff C.J.
 —

Prima facie, they are enactments in relation to matters comprehended within the subject designated by the words of the 27th head of section 91, under any definition of "the criminal law." The prohibitions seem to be aimed at the prevention of practices which Parliament conceives to be inimical to the public welfare; and each of the offences is declared in explicit terms to be an indictable offence.

There is nothing in the circumstances or the operation of these provisions show that Parliament was not exercising its powers under that subdivision. Whatever doubt may have previously existed, none can remain since the decision of the Judicial Committee in *Proprietary Articles Trade Association v. Attorney-General for Canada* (1), that, in enacting laws in relation to matters falling within the subject of the criminal law, as these words are used in section 91, Parliament is not restricted by any rule limiting the acts declared to be criminal acts to such as would appear to a court of law to be "in their own nature" criminal. The jurisdiction in relation to the criminal law is plenary; and enactments passed within the scope of that jurisdiction are not subject to review by the courts.

It is true that the term "criminal law" in section 91, subdivision 27, must be read subject to some qualification upon the ordinary sense of the words. When it is said that "criminal law" in section 91 (27) is criminal law in its widest sense, it is not meant that by force of section 92, including subdivision 15 of that section, the provinces have no power to pass enactments which would fall within the scope of the "criminal law," as that phrase would ordinarily be understood as applied to the enactments of a legislature possessing a general competence in relation to the criminal law. People in Canada are familiar with a network of prohibitions and regulations, the violation of which is punishable by fine, and sometimes by imprisonment, under municipal bylaws passed under the authority of provincial legislative measures. It has been held in many cases that prohibitions enforceable by fine and imprisonment enacted by the provincial legislatures may be valid enactments under section 92. Notable instances are the prohibitions enacted under the local option law

(1) [1931] A.C. 310.

of Ontario which was in question in *A.G. for Ontario v. A.G. for Dominion* (1); and the conditional and qualified prohibitions enforceable in the same way which were upheld in *Hodge v. The Queen* (2). Then there are the groups of provincial statutes passed under the authority of section 92 (1) dealing with the disqualification of voters; the disqualification of persons elected to sit and vote as members of the provincial legislatures; in which offences are created punishable by fine and imprisonment. These enactments which, in part at least, have the purpose of securing public order, and protecting the integrity of the representative system in the provinces, would, as I have said, fall within almost any definition of criminal law.

By the introductory clause of section 91, it is declared:

* * * that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated;

which classes of subjects include the "criminal law"; and the final paragraph of that section declares, in effect, that "any matter coming within" the criminal law shall not be deemed to come within any matter of a local or private nature.

comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Clearly, if the term "criminal law" is used in an absolutely unrestricted sense (in subdivision 27), then nothing in the nature of criminal law could be enacted under the authority of section 92. As Lord Herschell observed in the course of the argument on the reference already mentioned, in 1896, respecting the Ontario Local Option Statute, the term "criminal law" in subdivision 27 must be construed in such a way as to leave room for the operation of enactments of a provincial legislature under section 92 of the character just adverted to. It is also well settled that the Parliament of Canada cannot acquire jurisdiction over a subject which belongs exclusively to the provinces by attaching penal sanctions to legislation which in its pith and substance is legislation in relation to that subject in its provincial aspects alone (*In re Insurance Act of Canada*) (3).

1936
REFERENCE
re
SECTION
498A
OF THE
CRIMINAL
CODE.
Duff C.J.
—

(1) [1896] A.C. 348.

(2) (1883) 9 A.C. 117.

(3) [1932] A.C. 41, at 53.

1936
~
REFERENCE
re
SECTION
498A
OF THE
CRIMINAL
CODE.
Duff C.J.
—

We do not think any of these considerations are properly applicable to the statute before us. We think there is no ground on which we can hold that the statute, on its true construction, is not what it professes to be: an enactment creating criminal offences in exercise of the powers vested in Parliament in virtue of the 27th head of section 91.

The statute being *intra vires*, the interrogatory addressed to us should be answered in the negative.

CANNON J.—Paragraph (a) of 498A injects into every contract of sale by a person engaged in trade, commerce or industry a stipulation, obligatory under pain of a fine or imprisonment, in favour of the competitors of the purchaser, that any discount, rebate or allowance granted to the purchaser would be available at the time of the transaction to the aforesaid competitors in respect of a sale of goods of like quality and quantity.

This would, in every such case, be an application, by force of law, to every competitor of the purchaser as against the vendor of the “stipulation pour autrui” provided for by article 1029 of the Civil Code of the Province of Quebec, which says:

“A party in like manner may stipulate for the benefit of a third person, when such is the condition of a contract which he makes for himself, or of a gift which he makes for another; and he who makes the stipulation cannot revoke it, if the third person has signed his assent to it.”

Prima facie, therefore, Parliament has legislated directly in a matter of civil rights and has simply annexed to it a sanction, which would, by force of 91 (27) transfer the subject-matter from the provincial to the federal realm.

Blackstone, in his Commentaries, divides the wrongs known to the law into two species, private and public wrongs, considering torts under the former and crimes under the latter denomination. He says:

The distinction seems principally to consist in this: that private wrongs or civil injuries are an infringement or privation of the civil rights which belong to individuals considered merely as individuals; public wrongs or crimes are a breach and violation of the public rights and duties due to the whole community, considered as a community in its social aggregate capacity. As if I detain a field from another man, to which the law has given him a right, this is a civil injury and not a crime; for here only the right of an individual is concerned, and it is immaterial to the public which of us is in possession of the land; but treason, murder and robbery are properly ranked among crimes; since, beyond the injury done to individuals, they strike at the very being of

the society; which cannot possibly subsist, where actions of this sort are suffered to escape with impunity.

The first characteristic of a crime, therefore, is the danger to the community as a whole which the conduct of the offender is felt to involve. It may, from this point of view, be said to be the breach of a general obligation imposed by the law for the benefit of the State; whereas a tort is the breach of a particular obligation imposed by the law for the benefit of the individual.

The second characteristic by which a crime may be recognized is to be found, not in the nature of the conduct itself, but in the consequences to which that conduct gives rise. Whereas the object of the law in the case of a tort is primarily the *compensation* of the party injured, its object in the case of crime is primarily the *punishment* of the offender. The civil law looks rather to the plaintiff, the criminal law to the defendant. If, then, the result of the proceedings is to the satisfaction of the plaintiff, we may expect to find that the conduct in question amounts to a tort; if it is the punishment of the defendant, then it will be a crime. The result of this difference in attitude is reflected in the royal power of *Pardon*. The King may pardon a criminal, but not a civil offence. It is reasonable that he should have the power to waive an injury to the State of which he is the representative, and to put an end to proceedings which are carried on in his name; but he cannot absolve a defendant in a civil action from the duty of making compensation to the individual whom he has injured.

The above is taken from Stephen's Commentaries of the Laws of England, 19th ed., vol. IV, pp. 3, 4 and 5, where he gives as an approximate definition of crime that it is the breach of an obligation imposed by law for the benefit of the community and which results in the punishment of the offender.

Every command involves a sanction; and thus every law forbids every act which it forbids at all under pain of punishment. This makes it necessary to give a definition of punishment as distinguished from sanction.

The sanctions of all laws of every kind will be found to fall under two great heads; those who disobey them may be forced to indemnify another person either by damages or by specific performance, or they may themselves be subjected to some sufferings. In each case the legislator

1936
REFERENCE
re
SECTION
498A
OF THE
CRIMINAL
CODE.
Cannon J.

1936
 {
 REFERENCE
 re
 SECTION
 498A
 OF THE
 CRIMINAL
 CODE.
 Cannon J.
 —

enforces his commands by sanctions, but in the first case the sanction is imposed entirely for the sake of the injured party. Its enforcement is in his discretion and for his advantage. In the second, the sanction consists in suffering imposed on the person disobeying. It must be imposed for public purposes, and have no direct reference to the interests of the person injured by the act punished. Punishments are thus sanctions, but they are sanctions imposed for the public, and at the discretion and by the direction of those who represent the public. The result of the cases appears to be that the infliction of punishment in the interest of the public is the true test by which criminal are distinguished from civil proceedings, and that the moral nature of the act has nothing to do with the question. It is sufficient in this place to observe that they illustrate the general proposition that the province of criminal law must not be supposed to be restricted to those acts which popular language would describe as crimes, but it extends to every act, no matter what its moral quality may be, which the law has forbidden, and to which it has affixed a punishment in the interest of the public.

I conclude that the first paragraph (a) does not fill the foregoing requirements, inasmuch as it has in view only the protection of the individual competitors of the vendor, not the maintenance of public order or the promotion of the public weal. It deals exclusively with the civil law, and the only logical sanction to enforce the stipulation in favour of an aggrieved competitor would be to give him against the discriminating vendor a recourse in damages for compensation of any damage resulting from a refusal to sell to him at the same price goods of like quality and quantity. The penalty imposed amounts only to a colourable attempt to invade the provincial field.

Sections (b) and (c), on the other hand, are genuine criminal legislation, according to the above *criteria*.

I, therefore, say that subsection (a) of section 498A, with the penalties attached, does not come within the definition of criminal law and is *ultra vires*; subsections (b) and (c) would be *ultra vires* of the Parliament of Canada.

CROCKET, J.—It must, I think, be taken as established by the decisions of this Court and the Judicial Committee of the Privy Council that the Parliament of Canada cannot arrogate to itself any legislative jurisdiction, which it would otherwise not possess, in relation to any of the classes of subjects enumerated in s. 92 of the B.N.A. Act, by merely dealing with any such subject as criminal law under head 27 of s. 91; and that if, when examined, any legislation, though inserted in the Criminal Code, is found to deal with matters exclusively committed to the legislative jurisdiction of the provinces by s. 92, and not to be criminal in its essence, such legislation ought to be declared to be invalid. This principle was clearly affirmed by the Judicial Committee of the Privy Council in its judgment in *Attorney-General for Ontario v. Reciprocal Insurers* (1), delivered by the present Chief Justice of this Court. In that case the Judicial Committee was considering an amendment to s. 508 of the Criminal Code, adding thereto a provision which declared it to be an indictable offence for any person to solicit or accept any insurance risk except on behalf of a company or association licensed under the Dominion *Insurance Act*, 1917. The Board held that the amendment was invalid, since, in substance though not in form, it was in regulation of contracts of insurance, subjects not within the legislative competence of the Dominion. The Right Honourable Mr. Justice Duff (as he then was) in delivering the judgment of the Board, after reviewing the relevant previous decisions of the Judicial Committee, including the *Board of Commerce* case (2), and quoting extensively from the judgment of the Supreme Court of the United States in *Hammer v. Dagenhat* (3), said at pp. 339 and 340:

1936
REFERENCE
re
SECTION
498A
OF THE
CRIMINAL
CODE.
Crocket J.
—

It is not seriously disputed that the purpose and effect of the amendment in question are to give compulsory force to the regulative measures of the *Insurance Act*, and their Lordships think it not open to controversy that in purpose and effect s. 508C is a measure regulating the exercise of civil rights. But, on behalf of the Dominion, it is argued that, although such be the true character of the legislation, the jurisdiction of Parliament, in relation to the criminal law, is unlimited, in the sense, that

(1) [1924] A.C. 328.

(2) [1922] 1 A.C. 191.

(3) (1918) 247 U.S. 251.

1936
 ~~~~~  
 REFERENCE  
 re  
 SECTION  
 498A  
 OF THE  
 CRIMINAL  
 CODE.  
 ~~~~~  
 Crockett J.
 ~~~~~

in execution of its powers over that subject-matter, the Dominion has authority to declare any act a crime, either in itself or by reference to the manner or the conditions in which the act is done, and consequently that s. 508C, being by its terms limited to the creation of criminal offences, falls within the jurisdiction of the Dominion.

The power which this argument attributes to the Dominion is, of course, a far-reaching one. Indeed the claim now advanced is nothing less than this, that the Parliament of Canada can assume exclusive control over the exercise of any class of civil rights within the provinces, in respect of which exclusive jurisdiction is given to the provinces under s. 92, by the device of declaring those persons to be guilty of a criminal offence who in the exercise of such rights do not observe the conditions imposed by the Dominion.

And later, at pp. 342 and 343 His Lordship added:

And, indeed, to hold otherwise would be incompatible with an essential principle of the Confederation scheme, the object of which, as Lord Watson said in *Maritime Bank of Canada v. Receiver-General of New Brunswick* (1), was "not to weld the Province into one or to subordinate the Provincial Governments to a central authority," "Within the spheres allotted to them by the Act the Dominion and the Provinces are," as Lord Haldane said in *Great West Saddlery Co. v. The King* (2), "rendered in general principle co-ordinate Governments."

Their Lordships think it undesirable to attempt to define, however generally, the limits of Dominion jurisdiction under head 27 of s. 91; but they think it proper to observe, that what has been said above does not involve any denial of the authority of the Dominion Parliament to create offences merely because the legislation deals with matters which, in another aspect, may fall under one or more of the subdivisions of the jurisdiction entrusted to the Provinces. It is one thing, for example, to declare corruption in municipal elections, or negligence of a given order in the management of railway trains, to be a criminal offence and punishable under the Criminal Code; it is another thing to make use of the machinery of the criminal law for the purpose of assuming control of municipal corporations or of Provincial railways.

In the *Board of Commerce* case (3) in 1921 the Judicial Committee considered the question of the validity of an order made by the Board of Commerce, under the *Board of Commerce Act* and the *Combines and Fair Prices Act*, enacted by the Dominion Parliament in 1919, restraining certain manufacturers of clothing in the city of Ottawa in respect of sale prices of their products. Parliament purported to authorize the Board of Commerce to restrain and prohibit the formation and operation of such trade combinations for production and distribution in the provinces as the Board might consider to be detrimental to the public interest and to give the Board authority also to restrict accumulation of food, clothing and fuel beyond

(1) [1892] A.C. 437.

(2) [1921] 2 A.C. 100.

(3) [1922] 1 A.C. 191.

the amount reasonably required in the case of a private person for his household and in the case of a trader for his business, and to require the surplus to be offered for sale at fair prices. The Board was also authorized to attach criminal consequences to any breach of the Act which it determined to be improper. The Judicial Committee held that both these Acts were *ultra vires* the Dominion Parliament, since they interfered seriously with property and civil rights in the provinces, a subject reserved exclusively to the provincial legislatures by s. 92, and were not passed in any highly exceptional circumstances, such as war or famine, which conceivably might render trade combinations and hoarding outside the heads of s. 92 and within the general power given by s. 91. Counsel for the Dominion in that case argued that the legislation fell under s. 91 (2): The regulation of Trade and Commerce, and also that it fell within s. 91 (27): The Criminal Law, etc. Both these contentions were rejected for the reasons stated. Dealing with the criminal law contention, Lord Haldane, in delivering the judgment of the Board said—

For analogous reasons the words of head 27 of s. 91 do not assist the argument for the Dominion. It is one thing to construe the words "the criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters," as enabling the Dominion Parliament to exercise exclusive legislative power where the subject-matter is one which by its very nature belongs to the domain of criminal jurisprudence. A general law, to take an example, making incest a crime, belongs to this class. It is quite another thing, first to attempt to interfere with a class of subject committed exclusively to the Provincial Legislature, and then to justify this by enacting ancillary provisions, designated as new phases of Dominion criminal law which require a title to so interfere as basis of their application.

The learned counsel for the Dominion in the present case strongly argued that the authority of both the *Board of Commerce* (1) and the *Reciprocal Insurers* (2) cases had been materially modified by the decision of the Judicial Committee in *Proprietary Articles Trade Association v. Attorney-General for Canada* (3). I can find nothing in the judgment in the last-named case, as delivered by Lord Atkin, which detracts in any manner from the authority of either the *Board of Commerce* (1) or the

1936  
REFERENCE  
TO  
SECTION  
498A  
OF THE  
CRIMINAL  
CODE.  
Crocket J.

(1) [1922] 1 A.C. 191.

(2) [1924] A.C. 328.

(3) [1931] A.C. 310.



1936  
 REFERENCE  
 78  
 SECTION  
 498A  
 OF THE  
 CRIMINAL  
 CODE.  
 Crocket J.  
 ———

*Reciprocal Insurers* (1) cases, as regards the interpretation of 91 (27).

The Board in the later case was dealing with the validity of this very section of the Criminal Code, as it stood in Revised Statutes of Canada, 1927, ch. 36, which made it an indictable offence, punishable by fine or imprisonment, to conspire, combine or agree unduly to limit transportation facilities, restrain commerce or lessen manufacture or competition, as well as with s. 36, Revised Statutes of Canada, 1927, ch. 26 (*The Combines Investigation Act*), which made it an indictable offence punishable by fine or imprisonment to be a party to the formation or operation of a combine, as defined by s. 2, viz: a combine "which is to the detriment of the public and restrains or injures trade or commerce." Lord Atkin at p. 317, as reported, said:—

Both the Act and the section have a legislative history, which is relevant to the discussion. Their Lordships entertain no doubt that time alone will not validate an Act which when challenged is found to be *ultra vires*; nor will a history of a gradual series of advances till this boundary is finally crossed avail to protect the ultimate encroachment. *But one of the questions to be considered is always whether in substance the legislation falls within an enumerated class of subject, or whether on the contrary in the guise of an enumerated class it is an encroachment on an excluded class.* On this issue the legislative history may have evidential value.

And His Lordship, after setting out the history of the Act and of section 498, as it stood in the Revised Statutes, 1927, distinctly stated:—

Their Lordships have dealt at some length with the provisions of the Acts of 1919 inasmuch as the appellants relied strongly on the judgment of the Board in *In re Board of Commerce Act*, 1919 (2), which held both Acts to be *ultra vires*. Unless there are material distinctions between those Acts and the present, it is plainly the duty of this Board to follow the previous decision. It is necessary therefore to contrast the provisions of the Acts of 1919 with the provisions of the Act now in dispute.

He then proceeded to point out that by the new Act combines were defined as combines "which have operated or are likely to operate to the detriment or against the interest of the public, whether consumers, producers or others," and which "are mergers, trusts or monopolies, so-called," or result from the acquisition by any person of any control over the business of any other person or result from any agreement which has the effect of limiting facilities for production, manufacture or transport, or of fixing a common

price, or enhancing the price of articles or of preventing or lessening competition in or substantially controlling production or manufacture, or "otherwise restraining or injuring trade or commerce." After reviewing the provisions of the Act, His Lordship added:—

In their Lordships' opinion s. 498 of the Criminal Code and the greater part of the provisions of the Combines Investigation Act fall within the power of the Dominion Parliament to legislate as to matters falling within the class of subjects "the criminal law including the procedure in criminal matters" (s. 91, head 27). The substance of the Act is by s. 2 to define, and by s. 32 to make criminal, combines which the legislature in the public interest intends to prohibit. The definition is wide, and may cover activities which have not hitherto been considered to be criminal. But only those combines are affected "which have operated or are likely to operate to the detriment or against the interest of the public, whether consumers, producers, or others"; and if Parliament genuinely determines that commercial activities, which can be so described, are to be suppressed in the public interest, their Lordships see no reason why Parliament should not make them crimes. "Criminal law" means "the criminal law in its widest sense": *Attorney-General for Ontario v. Hamilton Street Ry. Co.* (1). It certainly is not confined to what was criminal by the law of England or of any Province in 1867. The power must extend to legislation to make new crimes. Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences? Morality and criminality are far from co-extensive; nor is the sphere of criminality necessarily part of a more extensive field covered by morality—unless the moral code necessarily disapproves all acts prohibited by the State, in which case the argument moves in a circle. It appears to their Lordships to be of little value to seek to confine crimes to a category of acts which by their very nature belong to the domain of "criminal jurisprudence"; for the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished. Their Lordships agree with the view expressed in the judgment of Newcombe J. that the passage in the judgment of the Board in the *Board of Commerce* case (2), to which allusion has been made, was not intended as a definition. In that case their Lordships appear to have been contrasting two matters—one obviously within the line, the other obviously outside it. For this purpose it was clearly legitimate to point to matters which are such serious breaches of any accepted code of morality as to be obviously crimes when they are prohibited under penalties. The contrast is with matters which are merely attempts to interfere with Provincial rights, and are sought to be justified under the head of "criminal law" colourably and merely in aid of what is in substance an encroachment.

I do not think it can fairly be said that any of the passages which I have quoted at such length from Lord

1936  
REFERENCE  
re  
SECTION  
498A  
OF THE  
CRIMINAL  
CODE.  
Crocket J.

1936  
 {  
 REFERENCE  
 TO  
 SECTION  
 498A  
 OF THE  
 CRIMINAL  
 CODE.  
 —  
 Crocket J.

Atkin's speech were intended to disapprove of anything previously laid down in the judgments of the Board in either the Board of Commerce or the *Reciprocal Insurers* case (1). The most that can be said is that Their Lordships agreed that the allusion which Lord Haldane made in the *Board of Commerce* case (2) to Parliament exercising "exclusive legislative power where the subject matter is one which by its very nature belongs to the domain of criminal jurisprudence" was not intended as a definition of criminal law as used in 91 (27), and that the quoted reference was made merely for the purpose of illustrating the difference between Parliament legislating genuinely on a matter which was obviously one of criminal law and legislating on a matter which was merely a colourable attempt to encroach upon provincial legislative jurisdiction. I think the same thing may be said of the observations which Lord Atkin himself made regarding the quality of a criminal act, that none of those observations were intended to lay down definitely the principle that the mere fact of Parliament prohibiting an act and attaching penal sanctions thereto must in all cases be taken as conclusive evidence of the criminal character of any legislation, the constitutional validity of which is called in question. Indeed, the whole judgment, in my opinion, indicates quite the contrary. One cannot read it throughout without seeing that the Board in that case itself considered very carefully the character of the legislation there under review in determining whether or not it was or was not genuine criminal legislation within the meaning of 91 (27). Indeed, the decision, in my opinion, far from modifying, actually confirms the principle laid down in the previous cases, as witness the statement that "one of the questions to be considered," in case of controversy between the two legislative powers "is always whether in substance the legislation falls within an enumerated class of subject or whether, on the contrary, in the guise of an enumerated class it is an encroachment on an excluded class."

I cannot therefore agree to the proposition that the jurisdiction of Parliament in relation to criminal law is plenary and that enactments passed within the scope of

(1) [1924] A.C. 328.

(2) [1922] 1 A.C. 191.



that jurisdiction are not subject to review by the courts, if by that it is meant to say that the courts have no right to review the quality and character of any legislation which Parliament chooses to place in the criminal code. Once it is determined that any such legislation in reality is of a criminal character, the courts of course will not presume to consider its wisdom or unwisdom, but in my opinion it is not only their right, but their clear duty to scrutinize any enactments, which are inserted in the criminal code, for the purpose of deciding whether they are or are not of such a quality or character as can properly be described as criminal law within the meaning of s. 91 (27). I can conceive of no other way in which a controversy as to legislative jurisdiction to enact a criminal law within the meaning of s. 91 (27) can properly be decided. If the mere fact of its enactment is itself to be regarded by the courts as conclusive, there would, as pointed out in the *Reciprocal Insurers'* case (1), be no class of civil rights over which the Parliament of Canada could not assume exclusive legislative control by the mere device of declaring those persons to be guilty of a criminal offence who in the exercise of such rights do not observe the conditions imposed by the Dominion.

Having examined the three subsections, which Parliament added to s. 498 of the Criminal Code, as we must do in order to determine their purpose and effect and answer the question, which the Governor in Council has submitted to us in regard to them, I have concluded that (b) and (c) allege offences which might reasonably be held to be of a criminal character, inasmuch as both require a specific intent to destroy competition or to eliminate a competitor—a thing which is bound in the end to operate to the detriment or against the interest of the public. The essential ingredient of the offence, as described in each of these subsections, is the intent to cause injury to the public or to an individual. They both, therefore, present on their face the characteristic feature of crime, viz: the intent to do wrong. In this respect they are in marked contrast with (a), which purports to make it a crime for anyone to be a party to any transaction of sale, which discriminates to his knowledge against the competitors of the purchaser in that any discount, rebate or allowance is granted to the

1936  
REFERENCE  
re  
SECTION  
498A  
OF THE  
CRIMINAL  
CODE.  
Crocket J.

1936  
 {  
 REFERENCE  
 re  
 SECTION  
 498A  
 OF THE  
 CRIMINAL  
 CODE.  
 —  
 Crocket J.  
 —

purchaser, over and above any discount, rebate or allowance available at the time to such competitors in respect of a sale of goods of like quality or quantity. No intent to destroy competition or to eliminate an individual competitor is required. On the contrary its apparent object is to prevent the granting of discounts, rebates or allowances to large scale purchasers of manufactured and all other goods for any reason whatever and to make the price of commodities uniform, as far as possible, and by this expedient to raise retail prices throughout the country and thus to deprive the great mass of the consuming population of the benefit of real competition in trade. Such a policy may be desirable and beneficial to a particular class of the population, but its purpose and effect is purely economic and involves the virtual control by Parliament of such subjects as contracts of sale, which the B.N.A. Act has assigned to the exclusive jurisdiction of the Provincial Legislatures, which, in my judgment, if I may say so, are in a much better position to deal with such subjects as matters of local and provincial concern than the federal Parliament. The crucial question, however, with which we are called upon to deal is as to whether such agreements as those described in (a) can legitimately be classed as falling under the head of criminal law. In my opinion s.s. (a) describes an act, which lacks every element of what is ordinarily associated with criminal law, either in the minds of lawyers or of laymen. It describes a thing which is neither civilly nor morally wrong in itself under the cloak of discrimination. I have no hesitation in saying that in my opinion it is not genuine criminal legislation and that, dealing as it does with a subject matter of such a character, its incorporation in the criminal code should be held to be a mere colourable attempt on the part of Parliament to encroach upon the legislative authority of the provinces.

I shall, therefore, answer the question which has been submitted to us in respect of these enactments that s.s. (a) of 498A of the Criminal Code is *ultra vires* of the Parliament of Canada.

JUDGMENT OF THE LORDS OF THE JUDICIAL  
COMMITTEE OF THE PRIVY COUNCIL,  
DELIVERED THE 28th JANUARY, 1937

IN THE MATTER of a Reference as to whether the Parliament of  
Canada had legislative jurisdiction to enact Section 498A of the  
Criminal Code.

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA,  
*Appellant,*

v.

THE ATTORNEY-GENERAL OF CANADA AND OTHERS,  
*Respondents.*

Present at the Hearing:

Lord Atkin.

Lord Thankerton.

Lord Macmillan.

Lord Wright (Master of the Rolls).

Sir Sidney Rowlatt.

(Delivered by Lord Atkin.)

This is an appeal from a judgment of the Supreme Court of Canada delivered on 17th June, 1936, on a reference by the Governor General in Council dated 5th November, 1935, raising the question whether section 498A of the Criminal Code is *ultra vires* of the Parliament of Canada. The Supreme Court unanimously held that subsections (b) and (c) were not *ultra vires*, and by a majority, the Chief Justice, Rinfret, Davis and Kerwin JJ., Cannon and Crockett JJ. dissenting, held that subsection (a) also was not *ultra vires*. The section 498A was introduced into the Criminal Code by section 9 of 25 & 26 G. 5, c. 56, the title of which is an Act to amend the Criminal Code:—

“Section 9. The said Act is further amended by inserting after section four hundred and ninety-eight the following section:

“498A. Every person engaged in trade or commerce or industry is guilty of an indictable offence and liable to a penalty not exceeding one thousand dollars or to one month's imprisonment, or, if a corporation, to a penalty not exceeding five thousand dollars, who



‘(a) is a party or privy to, or assists in, any transaction or sale which discriminates, to his knowledge, against competition of the purchaser in that any discount, rebate or allowance is granted to the purchaser over and above any discount, rebate or allowance available at the time of such transaction to the aforesaid competitors in respect of a sale of goods of like quality and quantity;’

“The provisions of this paragraph shall not, however, prevent a co-operative society returning to producers or consumers, or a co-operative wholesale society returning to its constituent retail members, the whole or any part of the net surplus made in its trading operations in proportion to purchases made from or sales to the society;

‘(a) engages in a policy of selling goods in any area of Canada at prices lower than those exacted by such seller elsewhere in Canada, for the purpose of destroying competition or eliminating a competitor in such part of Canada;

‘(c) engages in a policy of selling goods at prices unreasonably low for the purpose of destroying competition or eliminating a competitor’.”

Their Lordships agree with the Chief Justice that this case is covered by the decision of the Judicial Committee in the Proprietary Articles case (1931) A.C. 310. The decision in that case seems to be inconsistent with the ground of dissent of Crocket J. that subsection (a) lacks “the characteristic feature of crime, viz. the intent to do wrong.” The basis of that decision is that there is no other criterion of “wrongness” than the intention of the legislature in the public interest to prohibit the act or omission made criminal. Cannon J. was of opinion that the prohibition cannot have been made in the public interest because it has in view only the protection of the individual competitors of the vendor. This appears to narrow unduly the discretion of the Dominion legislature in considering the public interest. The only limitation on the plenary power of the Dominion to determine what shall or shall not be criminal is the condition that Parliament shall not in the guise of enacting criminal legislation in truth and in substance encroach on any of the classes of subjects enumerated in section 92. It is no objection that it does in fact affect them. If a genuine attempt to amend the criminal law it may obviously affect previously existing civil rights. The object of an amendment of the criminal law as a rule is to deprive the citizen of the right to do that which apart from the amendment he could lawfully do. No doubt the plenary power given by section 91 (27)

does not deprive the Provinces of their right under section 92 (15) of affixing penal sanctions to their own competent legislation. On the other hand there seems to be nothing to prevent the Dominion if it thinks fit in the public interest from applying the criminal law generally to acts and omissions which so far are only covered by provincial enactments. In the present case there seems to be no reason for supposing that the Dominion are using the criminal law as a pretence or pretext or that the legislature is in pith and substance only interfering with civil rights in the Province. Counsel for New Brunswick called the attention of the Board to the Report of the Royal Commission on Price Spreads, which is referred to in the order of reference. It probably would not be contended that the statement of the Minister in the order of reference that the section was enacted to give effect to the recommendations of the Royal Commission bound the Provinces or must necessarily be treated as conclusive by the Board. But when the suggestion is made that the legislation was not in truth criminal legislation, but was in substance merely an encroachment on the provincial field, the existence of the report appears to be a material circumstance. Their Lordships are in agreement with the decision of the majority of the Supreme Court. They are of opinion that no part of the section is *ultra vires*: and they will humbly advise His Majesty that this appeal should be dismissed.















IN THE MATTER of a Reference as to whether the Parliament of Canada had legislative jurisdiction to enact The Dominion Trade and Industry Commission Act, 1935.

TEXTS of The Dominion Trade and Industry Commission Act, and of the Judgments pronounced by the Supreme Court of Canada and by the Judicial Committee of His Majesty's Privy Council.



OTTAWA  
J. O. PATENAUDE, I.S.O.  
PRINTER TO THE KING'S MOST EXCELLENT MAJESTY  
1937





IN THE MATTER of a Reference as to whether the Parliament of Canada had legislative jurisdiction to enact The Dominion Trade and Industry Commission Act, 1935.

TEXTS of The Dominion Trade and Industry Commission Act, and of the Judgments pronounced by the Supreme Court of Canada and by the Judicial Committee of His Majesty's Privy Council.





IN THE MATTER of a Reference as to whether the Parliament of  
Canada had legislative jurisdiction to enact the Dominion Trade  
and Industry Commission Act, 1935.

## I N D E X

|                                                     | PAGE |
|-----------------------------------------------------|------|
| The Dominion Trade and Industry Commission Act..... | 5    |
| Judgment of the Supreme Court of Canada.....        | 15   |
| Judgment of the Privy Council.....                  | 20   |





# STATUTES OF CANADA, 1935

## CHAPTER 59.

An Act to establish a Dominion Trade and Industry Commission.

[Assented to 5th July, 1935.]

WHEREAS on the second day of February, 1934, the House of Commons passed a Resolution that a Select Special Committee of that House be appointed to inquire into and investigate the causes of the large spread between the prices received for commodities by the producer thereof and the prices paid by the consumers therefor, and the system of distribution in Canada of natural and manufactured products; and whereas a Select Special Committee was accordingly appointed and proceeded with the investigation and on the twenty-ninth day of June, 1934, reported that the investigation could not be completed before Parliament prorogued and recommended that the members of the Select Special Committee be appointed commissioners under Part I of the *Inquiries Act* to continue and complete the investigation and report to the Minister of Trade and Commerce; and whereas the members of the Select Special Committee were accordingly appointed commissioners under the *Inquiries Act* and continued and completed the investigation and reported on the ninth day of April, 1935; and whereas the majority of the commissioners recommended that a Federal Trade and Industry Commission be established with powers to regulate commerce and industry; and whereas it is expedient and in the public interest that effect be given to the aforesaid recommendations in so far as it is within the competence of Parliament so to do: Therefore His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

Preamble.  
R.S., c. 99.

1. This Act may be cited as *The Dominion Trade and Industry Commission Act, 1935*. Short title.

## INTERPRETATION.

- Definitions. 2. In this Act, unless the context otherwise requires,—
- "Commission". (a) "Commission" means the Dominion Trade and Industry Commission established under this Act;
- "Commissioner". (b) "Commissioner" means a member of the Commission including the Chief Commissioner and Assistant Chief Commissioner;
- "Commodity". (c) "Commodity" means any article, product or thing, whether of growth, produce or manufacture, which is the subject of trade or commerce;
- "Commodity standard". (d) "Commodity standard" means the specification of a standard of quality, efficiency, efficacy, performance, purity, potency, grade, durability, size, weight or capacity or any other characteristic or combination of characteristics for any commodity intended for consumption or use and denoting its origin or nature and suitability to fulfil the purpose for which it is intended;
- "Covering". (e) "Covering" includes label, wrapper, package, sack, bag, barrel, box, case or other receptacle attached to, or in which, any commodity is sold or offered for sale;
- "Director of Public Prosecutions". (f) "Director of Public Prosecutions" means the Director of Public Prosecutions appointed under this Act;
- "Industry". (g) "Industry" includes merchandising;
- "Laws prohibiting unfair trade practices". (h) "Laws prohibiting unfair trade practices" means the provisions of the *Agricultural Pests Control Act*, the *Canada Grain Act*, the *Combines Investigation Act*, the *Dairy Industry Act*, the *Electrical Units Act*, the *Electricity Inspection Act, 1928*, the *Feeding Stuffs Act*, the *Fertilizer Act*, the *Fish Inspection Act*, the *Food and Drugs Act*, the *Fruit, Vegetables and Honey Act*, the *Gas Inspection Act*, the *Inspection and Sale Act*, the *Live Stock and Live Stock Products Act*, the *Maple Sugar Industry Act, 1930*, the *Meat and Canned Foods Act*, the *Natural Products Marketing Act, 1934*, the *Patent Act, 1935*, the *Petroleum and Naphtha Inspection Act*, the *Precious Metals Marking Act, 1928*, the *Proprietary or Patent Medicine Act*, the *Seeds Act*, the *Trade Mark and Design Act*, the *Unfair Competition Act, 1932*, the *Water Meters Inspection Act*, the *Weights and Measures Act*, and of sections 404, 405, 406, 415A and 486 to 504, inclusive, of the *Criminal Code*, and of this Act and regulations under the said Acts, which provisions prohibit acts or omissions connected with industry as being fraudulent, misrepresentative or otherwise unfair or detrimental to the public interest;
- "Minister". (i) "Minister" means the President of the King's Privy Council for Canada;

(j) "National Research Council" means the Honorary "Research Council".  
Advisory Council for Scientific and Industrial Research  
established under the provisions of the *Research Council*  
*Act*;

(k) "Tariff Board" means the board established pur- "Tariff Board."  
suant to *The Tariff Board Act*. 1931, c. 55.

#### DOMINION TRADE AND INDUSTRY COMMISSION.

**3.** (1) There shall be a Commission to be known as the Commission.  
Dominion Trade and Industry Commission consisting of  
three Commissioners, of whom one shall be the Chief Com-  
missioner and another the Assistant Chief Commissioner.

(2) The members for the time being of the Tariff Board Tariff Board to be commis-  
sioners.  
shall, by virtue of holding office as members of the said  
Board and by virtue of this Act, be the Commissioners,  
and the Chairman and the Vice-Chairman of the said  
Board shall be the Chief Commissioner and Assistant  
Chief Commissioner respectively. Chief and Assistant  
Commissioners.

(3) Each Commissioner shall hold office only during Tenure of  
office.  
such time as he continues to hold office as a member of the  
Tariff Board.

**4.** (1) In case of the absence or incapacity of the Chief Absence or  
incapacity.  
Commissioner, the Assistant Chief Commissioner shall  
exercise the powers of the Chief Commissioner for him and  
in his stead, and in such case all regulations, orders or other  
instruments signed by the Assistant Chief Commissioner  
shall have the like force and effect as if signed by the Chief  
Commissioner.

(2) Whenever the Assistant Chief Commissioner appears Presumption.  
to have acted for or instead of the Chief Commissioner, it  
shall be conclusively presumed that he so acted in the  
absence or incapacity of the Chief Commissioner.

(3) If the Chief Commissioner deems it necessary for Authority  
to other  
Commissioners.  
the more speedy or convenient despatch of business, he  
may authorize another Commissioner to sign regulations,  
orders or other instruments in his stead, and everything  
done pursuant to such authority shall have the like force  
and effect as if done by the Chief Commissioner.

**5.** (1) Two Commissioners, including either the Chief Quorum.  
Commissioner or the Assistant Chief Commissioner, shall,  
except as otherwise provided in this Act, constitute a  
quorum, provided that in the case of an equal division of  
opinion as between two commissioners sitting as a quorum  
the third Commissioner shall be called on for his opinion;  
and provided further, that a preliminary inquiry under the  
*Combines Investigation Act* may be conducted by one Com- R.S., c. 26.  
missioner.



Commissioner *pro hac vice*.

(2) If any Commissioner, by reason of absence or incapacity, is unable at any time to perform the duties of his office, the Governor in Council may appoint a person to be a Commissioner *pro hac vice*.

Offices in Ottawa.

6. The office of the Commission shall be in the City of Ottawa, but the Commission may whenever circumstances render it expedient, hold sittings at any place in Canada.

Sittings.

7. The sittings of the Commission shall be public or private as the Commission decides.

Rules.

8. The Commission may make rules not inconsistent with this Act, the *Combines Investigation Act* or the *Inquiries Act*, respecting the sittings of the Commission and the practice and procedure in the case of investigations or other business of the Commission, and the apportionment of duties amongst the Commissioners and respecting the duties and employment of the officers, clerks and employees of the Commission.

Officials of Tariff Board to be officials of the Commission.

9. (1) The Secretary and other officers, clerks and employees of the Tariff Board shall, by virtue of holding office or being employed under the Tariff Board and by virtue of this Act, be officers, clerks or employees of the Commission and shall perform, for and under the direction of the Commission, services and functions similar to the services and functions performed by them as officers, clerks or employees of the Tariff Board.

Tenure of office.

(2) Each officer, clerk or employee of the Commission shall hold office or be employed only during such time as he continues to hold office or be employed as an officer, clerk or employee of the Tariff Board.

Rights to superannuation preserved.

R.S., c. 24.

(3) A civil servant who prior to or at the time of his appointment under the Tariff Board Act was or is a contributor under the provisions of the *Civil Service Superannuation Act* shall be eligible, notwithstanding the provisions of the *Civil Service Superannuation Act*, to continue to be a contributor under the said Act; his service under *The Tariff Board Act* shall be counted as service in the Civil Service for the purposes of the *Civil Service Superannuation Act* and he, his widow and children, or other dependents, if any, shall be eligible to receive the respective allowances or gratuities provided by the said Act; and in the event of his being retired from his office or position under *The Tariff Board Act* for any reason other than that of misconduct, he shall be eligible to receive the same benefits under the *Civil Service Superannuation Act* as if his office or position had been abolished.



**10.** No Commissioner or officer, clerk or employee of the Commission shall receive any remuneration in addition to that received by him as a member, officer, clerk or employee of the Tariff Board.

No additional remuneration.

**11.** No person employed in the service of His Majesty shall communicate or allow to be communicated to any person not legally entitled thereto, any information obtained under the provisions of this Act or allow any such person to inspect or have access to any written statement or document furnished under this Act.

Secrecy.

(2) Any person violating any provision of this section shall be guilty of an offence against this Act and liable on summary conviction to a penalty not exceeding two hundred dollars.

Penalty.

**12.** The expenses of the Commission shall be paid out of moneys appropriated by Parliament for the purpose.

Payment of expenses.

#### ADMINISTRATION OF COMBINES INVESTIGATION ACT.

**13.** The Commission shall be charged with the administration of the *Combines Investigation Act* and shall exercise all the powers and jurisdiction and perform all the duties conferred on the Commission under the said *Combines Investigation Act*.

Duties of Commission.  
R.S., c. 26.

#### PRICE AND PRODUCTION AGREEMENTS.

**14.** (1) In any case where the Commission, after full investigation under the *Combines Investigation Act*, is unanimously of opinion that wasteful or demoralizing competition exists in any specific industry, and that agreements between the persons engaged in the industry to modify such competition by controlling and regulating prices or production would not result in injury to or undue restraint of trade or be detrimental to or against the interest of the public, or where such agreements exist and in the unanimous opinion of the Commission but for their existence wasteful or demoralizing competition would exist in any specific industry, the Commission may so advise the Governor in Council and recommend that certain agreements be approved.

Agreements regulating price and production.

(2) The Governor in Council may, if of opinion that the conclusions of the Commission are well founded, approve of any such agreement, and shall make regulations requiring the Commission to determine from time to time whether the agreement is resulting in injury to or undue restraint of trade or is detrimental to the public interest.

Approval and regulations by Governor in Council.

Information  
and rescission  
of approval.

(3) The Commission shall require persons engaged in the industry to furnish full information relating to operations within the industry under the agreement and may at any time, of its own motion and in its absolute discretion, advise the Governor in Council to rescind the approval of the agreement and the Governor in Council may rescind the approval accordingly.

Consent of  
Commission  
for  
prosecution.

(4) In any case where the Governor in Council has approved an agreement under this section, no prosecution of a party to such agreement shall be instituted under the *Combines Investigation Act* or under sections four hundred and ninety-eight and four hundred and ninety-eight A or any other relevant section of the *Criminal Code* for an offence arising in the performance of such agreement, except with the consent of the Commission.

#### COMMODITY STANDARDS.

Duties of  
Commission.

**15.** (1) The Commission shall be charged with responsibility to recommend the prosecution of offences against acts of the Parliament of Canada and regulations thereunder, relating to commodity standards and the Attorney General of Canada may require the Director of Public Prosecutions to institute criminal proceedings for the punishment of any such offence.

Powers of  
Commission.

(2) The Commission may,—

- (a) study, investigate, report and advise upon any question relating to commodity standards, the grading of commodities and the protection of consumers generally;
- (b) inquire and hear representatives of industry and trade and of consumers as to the desirability of establishing commodity standards and grades for any commodity and report thereon to the Minister.

#### *National Research Council.*

Additional  
powers.

**16.** In addition to its powers and duties under any other statute or law, the National Research Council shall, on the request of the Commission, from time to time,—

- (a) study, investigate, report and advise upon all matters relating to commodity standards;
- (b) prepare draft specifications of commodity standards for any commodity or grade, and recommend methods of designating such grade;
- (c) analyse and report upon any commodity as to its quality, properties and content, and as to whether and to what extent it conforms to the requirements of any recognized or generally accepted standard.

**17.** (1) The National Research Council shall, in respect of any commodity forwarded to it by the Commission or the Director of Public Prosecutions, report

Reports in respect of products forwarded.

Contents of report.

- (a) the ingredients of such commodity, in so far as such information may be necessary to the proper use of the commodity;
  - (b) any adulterants and harmful, injurious or deleterious substances the commodity may be found to contain;
  - (c) its quality and probable performance and efficiency; and
  - (d) whether it conforms to any recognized or generally accepted standard and specification;
- and if adequate information to answer the inquiry is not already available, the National Research Council shall analyse or test the commodity.

(2) The report of the National Research Council upon any analysis or test made under the provisions of this section shall not be used for advertising or commercial purposes in any way; and any person who contravenes the provisions of this subsection shall be guilty of an offence and liable upon summary conviction, for each such offence, to a penalty not exceeding one hundred dollars.

Not to be used for advertising purposes.

(3) No action or other proceedings may be instituted against the National Research Council or any officer or employee of the Council, in respect of any advice, information or report given or made in good faith under this Act or any other Act of the Parliament of Canada.

Advice, reports, etc., to be privileged.

### *"Canada Standard."*

**18.** (1) Notwithstanding anything contained in *The Unfair Competition Act, 1932*, or any other statute or law, the words "Canada Standard" or initials "C.S." shall be a national trademark and the exclusive property in and the right to the use of such trademark is hereby declared to be vested in His Majesty in the right of the Dominion of Canada, subject to the provisions of this Act.

"Canada standard" to be national trademark.

(2) Such national trademark, as applied to any commodity pursuant to the provisions of this Act or any other Act of the Parliament of Canada, shall constitute a representation that such commodity conforms to the requirements of a specification of a commodity standard for such commodity or class of commodity established under the provisions of any Act of the Parliament of Canada.

Effect of application

**19.** (1) Any producer or manufacturer or dealer or merchant in Canada may apply the national trademark "Canada Standard" or initials "C.S.," to any commodity produced or manufactured or sold by him or to the covering thereof,

Conditions of use.



in such manner as the Commission may by regulation prescribe, under and subject to the following conditions:—

(a) Such commodity shall conform to the requirements of a specification of a commodity standard for such commodity or class of commodity established under the provisions of any Act of the Parliament of Canada;

(b) Where grade designations, whether numerical or alphabetical or special, have been established under the provisions of any Act of the Parliament of Canada for various qualities of such commodity, the appropriate grade designation for each quality of such commodity shall be conspicuously applied to the commodity, or on the covering thereof, in association with the words "Canada Standard" or initials "C.S." in such form as the Commission may by regulation prescribe: Provided that the Commission may by regulation prescribe a list of specific commodities to which, in its opinion, it is impossible to apply this paragraph, and this paragraph shall not apply to any commodity appearing in such list.

Proviso.

Penalty.

(2) Every person who applies the national trademark "Canada Standard" or initials "C.S.," to any commodity in violation of the conditions hereinbefore provided shall be guilty of an offence and liable upon indictment, or upon summary conviction, to a penalty, for each and every such offence, not exceeding five thousand dollars in the case of a corporation, and not exceeding one thousand dollars in the case of an individual and in addition in the case of an individual to imprisonment for any term not exceeding six months.

#### UNFAIR TRADE PRACTICES.

Complaints

20. The Commission shall receive complaints respecting unfair trade practices and may investigate the same and, either before or after an investigation, if of opinion that the practice complained of constitutes an offence against any Dominion law prohibiting unfair trade practices, may communicate the complaint and such evidence, if any, in support thereof as is in the possession of the Commission to the Attorney General of Canada with a recommendation that all persons who are parties or privies to such offence be prosecuted for violation of the applicable Act. The Attorney General of Canada, if he concurs in such recommendation, may refer it with such complaint and such evidence, if any, either to the Director of Public Prosecutions or to the Attorney General of the province within which the offence is alleged to have been committed for such action as may seem to be appropriate in the circumstances.



## DIRECTOR OF PROSECUTIONS.

**21.** (1) The Governor in Council may appoint an officer to be called the Director of Public Prosecutions with a salary not exceeding twelve thousand dollars per annum. Appointment and salary.

(2) A person appointed as Director of Public Prosecutions shall be a barrister or advocate of at least ten years standing at the bar of any of the provinces of Canada. Barrister or advocate.

(3) The Director of Public Prosecutions shall hold office during good behaviour for a period of ten years from the date of appointment but may be removed for cause at any time by the Governor in Council. Tenure of office.

**22.** It shall be the duty of the Director of Public Prosecutions under the superintendence of the Minister of Justice Duties.

(a) to institute, at the instance of the Attorney General of Canada criminal proceedings for violation of any of the laws prohibiting unfair trade practices in cases which appear to be of importance or difficulty or in which special circumstances or the refusal or failure of any other person to institute, such proceedings appear to render the action of such Director necessary to secure the due prosecution of an offender;

(b) to give such advice or assistance to the Attorney General of any province in connection with the prosecution of offenders against laws prohibiting unfair trade practices as appears necessary to secure the prosecution of such offenders;

(c) to assist the Commission in the conduct of any investigation where it is alleged or complained that an offence against any of the laws prohibiting unfair trade practices has been or appears to be about to be committed.

## FAIR TRADE CONFERENCES.

**23.** (1) The Commission may from time to time at the instance of the Governor in Council or at the request of representative persons engaged in any industry, or of its own motion, invite persons engaged in such industry to a conference for the purpose of considering the commercial practices prevailing in such industry and determining what practices are unfair or undesirable in the interest of the industry and of any person engaged in such industry and of the general public. Conferences.

(2) The Commission may make public the general opinion of the conference or the opinion of the Commission as to and trade practice considered to be unfair or undesirable. Publication.

## CO-OPERATION WITH BOARDS OF TRADE.

Co-operation  
with boards  
of trade, etc.

**24.** The Commission may co-operate with and assist in any manner in which it deems advisable any board of trade or chamber of commerce in connection with any commercial arbitration being conducted by or under the direction or authority of such board of trade or chamber of commerce.

## ECONOMIC INVESTIGATION.

Investiga-  
tions.

**25.** The Commission shall, when so required by the Governor in Council, study, investigate, report and advise upon questions relating to the general trend of social or economic conditions or to any social or economic problem of Canada, and shall co-operate, when so required, with the Economic Council, established under *The Economic Council of Canada Act, 1935*, in connection with any economic investigation.

## GENERAL.

Provisions  
of other Acts  
applicable to  
inquiries.

**26.** All the provisions of the *Inquiries Act*, the *Combines Investigation Act* and of the *Tariff Act*, and of any amendment thereto not repugnant to the provisions of this Act shall apply to any inquiry or investigation under this Act and the Commission shall have all the powers of a commissioner appointed under the *Inquiries Act*, except in so far as any such powers may be inconsistent with the provisions of this Act.

Publication  
of certain  
reports.

**27.** (1) The Commission shall within fifteen days after making any report, recommendation or finding under this Act make the same public in such manner as seems desirable unless the Commission is unanimously of the opinion that the public interest would not be served by publication or that the public interest would be better served by withholding publication.

Reasons.

(2) Wherever possible the Commission shall with the report, recommendation or finding make public the reasons and the facts upon which the decision is based.

Hearings.

(3) In the case of any agreement or proposed agreement for the control and regulation of prices or production, the Commission shall in such manner as seems desirable make the same public, and shall fix a date at least fifteen days from the date of publication aforesaid for hearing representations by any interested persons whether producers, consumers or others.

When  
the Act  
comes into  
force.

**28.** This Act shall come into force on the first day of October, 1935.

# JUDGMENT OF THE SUPREME COURT OF CANADA

IN THE MATTER OF A REFERENCE AS TO  
WHETHER THE PARLIAMENT OF CANADA  
HAD LEGISLATIVE JURISDICTION TO EN-  
ACT THE DOMINION TRADE AND INDUS-  
TRY COMMISSION ACT, 1935, BEING 25-26  
GEO. V, C. 59.

(1936)  
S.C.R., 379.

\* Jan. 17,  
20, 22.

\* June 17.

*Constitutional law—Dominion Trade and Industry Act—Constitutional validity—Agreements between persons in same industry to modify undue competition—National Research Council—"Canada Standard" as trade-mark—Director of Public Prosecutions.*

Section 14 of the Dominion Trade and Industry Act provides *inter alia* that agreements between persons engaged in any specific industry, entered into in order to modify wasteful or demoralizing competition existing in such industry, may be approved by the Governor in Council on the advice of the Commission.

*Held* that said section is *ultra vires* of the Parliament of Canada. Its enactments are not necessarily incidental to the exercise of any powers of the Dominion in relation to criminal law, nor can such section be sustained as legislation in relation to the regulation of trade and commerce.

Sections 16 and 17 of the same Act enacts *inter alia* that, in addition to its powers and duties, under any other statute or law, the National Research Council shall, on the request of the Commission, study, investigate, report and advise upon all matters relating to commodity standards as defined in the Act; and subsection 3 of section 17 provides that such advices and reports shall be privileged.

*Held* that these two sections are *intra vires* of the Parliament of Canada. In view of the responsibilities of the Dominion Parliament in respect of the criminal law and trade and commerce, Parliament may exercise a wide latitude in prosecuting investigations for ascertaining the facts with regard to fraudulent commercial practices, including adulteration.

Sections 18 and 19 of the same Act provide that the words "Canada standard" or initials "C.S." shall be a national trade-mark vested in His Majesty in the right of the Dominion of Canada which may be used only under the conditions prescribed, including the condition that the commodity, to which such trade-mark is applied, shall conform to the requirements of a commodity standard for such commodity or class of commodity established under the provisions of an Act of the Parliament of Canada.

*Held* that both sections are *ultra vires* of the Parliament of Canada. The so-called trade-mark is not a trade-mark in any proper sense of the term and the function of the letters "C.S." as declared by subsection 1 of section 18 is different from the function of an ordinary trade-mark: that subsection is really an attempt to create a civil right of novel character and to vest it in the Crown in right of the Dominion. Subsection 2 of section 18 is also objectionable as attempting to control the exercise of a civil right in the provinces.

Section 20 of the same Act provides that the Commission may receive complaints respecting unfair trade practices and may investigate the same and recommend prosecutions if of opinion that the practice com-

\* PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket, Davis and Kerwin JJ.



1936  
 {  
 REFERENCE  
 re  
 DOMINION  
 TRADE AND  
 INDUSTRY  
 COMMISSION  
 —  
 Duff C.J.  
 —

plained of constitutes an offence against any one of the Dominion Laws mentioned in s. 2 (h) of the Act.

*Held* that such section is *intra vires* of the Parliament of Canada in so far as the enactments enumerated in section 2 (h) of the Act may be *intra vires*.

Sections 21 and 22 of the same Act provide for the appointment of an officer to be called the Director of Public Prosecutions to assist in the prosecution of offences against any of these laws mentioned in section 2 (h) of the Act.

*Held* that these sections (as applicable to the criminal offences created by such of the enactments enumerated in section 2 (h) as may be *intra vires*) are not *ultra vires* of the Parliament of Canada. Authority of the Parliament to enact these provisions is necessarily incidental to the exercise of legislative authority in relation to the criminal offences created by the laws "prohibiting unfair trade practices" validly enacted in such of the statutes enumerated in section 2 (h) as may be competent.

REFERENCE by His Excellency the Governor General in Council to the Supreme Court of Canada, in the exercise of the powers conferred by section 55 of the *Supreme Court Act* (R.S.C. 1927, c. 35) of the following question: Is the *Dominion Trade and Industry Commission Act*, or any of the provisions thereof and in what particular or particulars or to what extent, *ultra vires* of the Parliament of Canada?

The Order in Council referring the question to the Court is as follows:

The Committee of the Privy Council have had before them a report, dated 30th October, 1935, from the Minister of Justice, referring to the *Dominion Trade and Industry Commission Act*, 1935, being chapter 59 of the statutes of Canada, 1935, which was passed, as appears from the recitals contained in the preamble of the said Act, for the purpose of giving effect to certain recommendations contained in the report of the Royal Commission on Price Spreads.

The Minister observes that doubts exist or are entertained as to whether the Parliament of Canada had legislative jurisdiction to enact the said Act, either in whole or in part, and that it is expedient that such question should be referred to the Supreme Court of Canada for judicial determination.

The Committee, accordingly, on the recommendation of the Minister of Justice, advise that the following question be referred to the Supreme Court of Canada, for hearing



S.C.R.] SUPREME COURT OF CANADA

and consideration, pursuant to section 55 of the *Supreme Court Act*,—

(381)

1936

REFERENCE

re

DOMINION  
TRADE AND  
INDUSTRY  
COMMISSION

Duff C.J.

Is the *Dominion Trade and Industry Commission Act*, or any of the provisions thereof and in what particular or particulars or to what extent, *ultra vires* of the Parliament of Canada?

E. J. LEMAIRE,

*Clerk of the Privy Council.*

Section 2 (h) of the Act, referred to in the judgment, reads as follows:

“Laws prohibiting unfair trade practices” means the provisions of the *Agricultural Pests Control Act*, *The Canada Grain Act*, the *Combines Investigation Act*, the *Dairy Industry Act*, the *Electrical Units Act*, *The Electricity Inspection Act*, 1928, the *Feeding Stuffs Act*, the *Fertilizer Act*, the *Fish Inspection Act*, the *Food and Drugs Act*, *The Fruit, Vegetables and Honey Act*, the *Gas Inspection Act*, the *Inspection and Sale Act*, the *Live Stock and Live Stock Products Act*, *The Maple Sugar Industry Act*, 1930, the *Meat and Canned Foods Act*, *The Natural Products Marketing Act*, 1934, *The Patent Act*, 1935, the *Petroleum and Naphtha Inspection Act*, *The Precious Metals Marking Act*, 1928, the *Proprietary or Patent Medicine Act*, the *Seeds Act*, the *Trade Mark and Design Act*, *The Unfair Competition Act*, 1932, the *Water Meters Inspection Act*, the *Weights and Measures Act*, and of sections 404, 405, 406, 415A and 486 to 504, inclusive, of the *Criminal Code*, and of this Act and regulations under the said Acts, which provisions prohibit acts or omissions connected with industry as being fraudulent, misrepresentative or otherwise unfair or detrimental to the public interest.”

\* The judgment of the Court was delivered by

DUFF C.J.—The sections which require consideration are sections 14, 16, 17, 18, 20, 21 and 22.

As to section 14, we cannot perceive any ground for holding that the enactments of this section are necessarily incidental to the exercise of any powers of the Dominion in relation to the criminal law. Nor can the section, we think, be sustained as legislation in relation to the regulation of trade and commerce consistently with the passage

\* *Reporter's note:* Counsel on the argument of this Reference were the same as those mentioned at p. 365.

1936  
 {  
 REFERENCE  
 re  
 DOMINION  
 TRADE AND  
 INDUSTRY  
 COMMISSION  
 {  
 Duff C.J.

quoted from the judgment of the Judicial Committee in *Snider's* case (1), in the reasons given in the judgment upon the Reference concerning the *Natural Products Marketing Act*. It is to be observed that this section contemplates action by the Commission and by the Governor in Council in respect of individual agreements which may relate to trade that is entirely local.

If confined to external trade and interprovincial trade, the section might well be competent under head no. 2 of section 91; and if the legislation were in substance concerned with such trade, incidental legislation in relation to local trade necessary in order to prevent the defeat of competent provisions might also be competent; but as it stands, we think this section is invalid.

As regards sections 16 and 17, it would appear that in view of the responsibilities of the Dominion Parliament in respect of the criminal law and trade and commerce, Parliament may (as seems to be suggested by the judgments of the Judicial Committee in the *Board of Commerce* case (2) and in *Proprietary Articles Trade Association v. Attorney-General for Canada* (3), exercise a wide latitude in prosecuting investigations for ascertaining the facts with regard to fraudulent commercial practices, including adulteration; for that reason we think these two sections, 16 and 17, are *intra vires*. Subsection 3 of section 17 would seem to be reasonably ancillary to the principal provisions of the two sections.

As to sections 18 and 19, it is not necessary to pass upon the question whether or not the exclusive legislative jurisdiction of the Dominion extends to the subject of trade marks in virtue of subdivision 2 of section 91, "The regulation of trade and commerce." The so-called trade mark is not a trade mark in any proper sense of the term. The function of a trade mark is to indicate the origin of goods placed on the market and the protection given to a trade mark is intended to be a protection to the producer or seller of his reputation in his trade. The function of the letters "C.S.," as declared by section 18 (1), is something altogether different. That subsection is really an attempt to create a civil right of novel character and to vest it in

(1) [1925] A.C. 396.

(2) [1922] 1 A.C. 191, at 201.

(3) [1931] A.C. 310.

the Crown in right of the Dominion. Generally speaking, except when legislating in respect of matters falling within the enumerated subjects of section 91, Parliament possesses no competence to create a civil right of a new kind which, if validly created, would be a civil right within the scope and meaning of head no. 13 of section 92. The second subsection is also objectionable as attempting to control the exercise of a civil right in the provinces.

Section 19 is merely subsidiary to section 18 and necessarily falls with it.

The first part of section 20 would appear to be unobjectionable as respects enactments mentioned in section 2 (*h*) which may be *intra vires* of Parliament. As regards the validity of these enactments we have only heard argument in respect of two of them; the *Natural Products Marketing Act* and section 498A of the Criminal Code. We have elsewhere given our reasons for considering the first of these *ultra vires*. As to the second of them (section 498A of the Criminal Code) a majority of the Court hold that section to be *intra vires* in its entirety (Cannon and Crocket JJ. dissenting as to subsection (*a*) of that section).

As to sections 21 and 22, it would appear that authority to enact these provisions is necessarily incidental to the exercise of legislative authority in relation to the criminal offences created by the laws "prohibiting unfair trade practices" validly enacted in such of the statutes enumerated in section 2 (*h*) as may be competent. We do not think it can be said that the authority to provide for the prosecution of criminal offences falls "strictly" within the subject "Criminal law and criminal procedure,"—head 27 of the enumerated heads of section 91; but our view is that the authority to make such provision, and the authority to enact conditions in respect of the institution and the conduct of criminal proceedings is necessarily incidental to the powers given to the Parliament of Canada under head no. 27 (*Proprietary Articles Trade Association v. Attorney-General for Canada*) (1).

This reasoning would appear to apply to the question of the validity of subsection 1 of section 15 and the second part of section 20, which, accordingly, seem to be valid.

JUDGMENT OF THE LORDS OF THE JUDICIAL  
COMMITTEE OF THE PRIVY COUNCIL,  
DELIVERED THE 28th JANUARY, 1937

IN THE MATTER of a Reference as to whether the Parliament of  
Canada had legislative jurisdiction to enact The Dominion Trade  
and Industry Commission Act, 1935.

THE ATTORNEY-GENERAL OF ONTARIO

*Appellant*

v.

THE ATTORNEY-GENERAL OF CANADA AND OTHERS

*Respondents*

THE ATTORNEY-GENERAL OF CANADA

*Appellant*

v.

THE ATTORNEY GENERAL OF ONTARIO

*Respondent*

Present at the Hearing:

Lord ATKIN.

Lord THANKERTON.

Lord MACMILLAN.

Lord WRIGHT (Master of the Rolls).

Sir SIDNEY ROWLATT.

(Delivered by Lord Atkin.)

This is an appeal and cross-appeal from a judgment of the Supreme Court on a reference by the Governor-General in Council dated 5th November, 1935, asking whether The Dominion Trade and Industry Commission Act was *ultra vires* of the Parliament of Canada. The unanimous answer of the Supreme Court which was expressed to be directed only to those sections of the Act upon which they had the benefit of argument was that sections 14, 18 and 19 were *ultra vires*, that sections 16 and 17 were not *ultra vires*; and that sections 20, 21 and 22 so far as they were applicable to such of



the enactments or to offences created by such of the enactments enumerated in section 2 (*h*) as might be *intra vires* were not *ultra vires*. The Board were invited in argument to deal with sections 23-26 inclusive which are not referred to in the judgment of the Supreme Court presumably because no argument upon them was addressed to the Court. Except on one point, viz., as to validity of sections 18 and 19 their Lordships agree with the judgment of the Supreme Court and the reasons given by the Chief Justice with which the other learned judges concurred. Sections 15 (2), 16, 17 and 20 appear to be legitimate provisions for ascertaining whether criminal acts have been committed. Section 22 (*a*) was said to take out of the control of the law officers of the Province the conduct of the criminal proceedings referred to in the section. If so, it was said to encroach upon section 92 (14): the Administration of Justice in the Province. A similar objection was made to the latter part of section 20. The answer in respect of both sections is that the contention is based upon a construction of the section which the words do not bear. Nothing in the section gives either the Attorney-General of Canada, or the Director of Public Prosecutions any authority other than to commence proceedings in accordance with the law of the Province and thereafter to give such assistance to the authorities of the Province as is within the existing rights of persons in such case, and as may be acceptable to the authorities. Sections 23 to 26 appear to define the power of the Commission, and to give them no rights of interfering with rights or property in the Province, except possibly powers under section 26 which are of like validity with the powers given by the valid Dominion Acts there referred to.

The only remaining question is as to the validity of sections 18 and 19, which is the subject matter of the cross-appeal, and in this matter only their Lordships find themselves in disagreement with the judgment of the Supreme Court.

Section 18 (1) provides that the words "Canada Standard" or the initials "C.S." shall be a national trade mark and the exclusive property in, and the right to the use of such trade mark is thereby declared to be vested in His Majesty in the right of the Dominion. By subsection (2) such national trade mark as applied to any commodity pursuant to the provisions of that Act or any other Act of the Parliament of Canada is to constitute a representation that such commodity conforms to the requirements of a specification of a commodity standard established under the provisions of any Dominion Act. By section 19 (1) any producer or manufacturer or merchant is given permission to apply the national trade mark to any commodity provided it conforms to the appropriate statutory specifica-

tion and by subsection (2) it is made an offence to apply the mark to any commodity in violation of the prescribed conditions.

There exists in Canada a well-established code relating to trade marks created by Dominion statutes, to be found now in R.S.C. 1927, c. 201, amended by S.C. 1928, c. 10. It gives to the proprietor of a registered trade mark the exclusive right to use the trade mark to designate articles manufactured or sold by him. It creates therefore a form of property in each Province and the rights that flow therefrom. No one has challenged the competence of the Dominion to pass such legislation. If challenged one obvious source of authority would appear to be the class of subjects enumerated in 91 (2), the Regulation of Trade and Commerce, referred to by the Chief Justice. There could hardly be a more appropriate form of the exercise of this power than the creation and regulation of a uniform law of trade marks. But if the Dominion has power to create trade mark rights for individual traders, it is difficult to see why the power should not extend to that which is now a usual feature of national and international commerce—a national mark. It is perfectly true as is said by the Chief Justice that the method adopted in section 18 is to create a civil right of a novel character. Ordinarily a trade mark gives rights only when used in connection with goods manufactured or sold by the person who has the right to use the mark. A trade mark “in gross” would be an anomaly. And it obviously is not contemplated that the Crown should have any proprietary interest in the goods to which the mark vested in the Crown is to be applied. But there seems no reason why the legislative competence of the Dominion Parliament should not extend to the creation of juristic rights in novel fields, if they can be brought fairly within the classes of subjects confided to Parliament by the constitution. The substance of the legislation in question as to define a national mark, to give the exclusive use of it to the Dominion so as to provide a logical basis for a system of statutory licences to producers, manufacturers and merchants. To vest the “exclusive property” in the mark in His Majesty is probably no more than to vest “the use of” the mark in His Majesty. It may afford a useful civil protection for the mark when it is violated in Canada by persons who have not violated the somewhat restricted prohibition of the penal subsection (which only applies to persons who “apply” the mark to commodities) or violated abroad, where the penal provisions of the law of Canada could not be applied at all. It may be noticed that section 53 of R.S.C., c. 201, appears to afford protection in Canada to trade marks owned by foreign associations though held by them “in gross.” For the reasons above given the legislation appears to their Lord-

ships to be within the competence of the Dominion Parliament. No appeal was directed to the Board as to the answer to section 14. Their Lordships therefore will humbly advise His Majesty that the appeal be dismissed and the cross-appeal be allowed and that the answers be varied as to sections 18 and 19 by stating that the sections are not *ultra vires*, and by adding that as to sections 23 to 26 inclusive these sections are not *ultra vires*.









IN THE MATTER of a Reference as to whether the Parliament of Canada had legislative jurisdiction to enact The Natural Products Marketing Act, 1934, and its amending Act, The Natural Products Marketing Act Amendment Act, 1935.

TEXTS of The Natural Products Marketing Act, 1934; The Natural Products Marketing Act Amendment Act, 1935, and the Judgments pronounced by the Supreme Court of Canada and by the Judicial Committee of His Majesty's Privy Council.



OTTAWA  
J. O. PATENAUDE, I.S.O.  
PRINTER TO THE KING'S MOST EXCELLENT MAJESTY  
1937





IN THE MATTER of a Reference as to whether the Parliament of Canada had legislative jurisdiction to enact The Natural Products Marketing Act, 1934, and its amending Act, The Natural Products Marketing Act Amendment Act, 1935.

TEXTS of The Natural Products Marketing Act, 1934; The Natural Products Marketing Act Amendment Act, 1935, and the Judgments pronounced by the Supreme Court of Canada and by the Judicial Committee of His Majesty's Privy Council.



OTTAWA  
J. O. PATENAUDE, I.S.O.  
PRINTER TO THE KING'S MOST EXCELLENT MAJESTY  
1937



IN THE MATTER of a Reference as to whether the Parliament of Canada had legislative jurisdiction to enact The Natural Products Marketing Act, 1934, and its amending Act, The Natural Products Marketing Act Amendment Act, 1935.

## I N D E X

|                                                           | PAGE |
|-----------------------------------------------------------|------|
| The Natural Products Marketing Act, 1934.....             | 5    |
| The Natural Products Marketing Act Amendment Act, 1935... | 16   |
| Judgment of the Supreme Court of Canada.....              | 18   |
| Judgment of the Privy Council.....                        | 47   |





# STATUTES OF CANADA, 1934

## CHAPTER 57.

An Act to improve the methods and practices of marketing of natural products in Canada and in export trade, and to make further provision in connection therewith.

[Assented to 3rd July, 1934.]

HIS Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

### SHORT TITLE.

1. This Act may be cited as *The Natural Products Marketing Act, 1934.* Short title.

### INTERPRETATION.

2. In this Act and in any regulations made thereunder, unless the context otherwise requires,— Definitions.

- (a) "Board" means the Dominion Marketing Board established under this Act; "Board."
- (b) "local board" means a board authorized to administer a scheme approved under this Act; "Local board."
- (c) "marketing" includes buying and selling, shipping for sale or storage and offering for sale; "Marketing."
- (d) "Minister" means the Minister designated by the Governor in Council to administer this Act; "Minister."
- (e) "natural product" includes animals, meats, eggs, wool, dairy products, grains, seeds, fruit and fruit products, vegetables and vegetable products, maple products, honey, tobacco, lumber, and such other natural products of agriculture and of the forest, sea, lake or river, and any article of food or drink wholly or partly manufactured or derived from any such product that may be designated by the Governor in Council, in accordance with the provisions of this Act; "Natural product."
- (f) "province of production" means the province within which the regulated product is produced; "Province of production."

"Regulated product."

(g) "regulated product" means a natural product to which a scheme approved under this Act relates, but does not include

(i) in case the said scheme relates only to the product of a part of Canada, such product in so far as it is produced outside that part of Canada;

(ii) in case the said scheme relates only to the product marketed outside the province of production, such product in so far as it is marketed within the province of production;

(iii) in case the said scheme relates only to the product exported, such product in so far as it is not exported.

#### DOMINION MARKETING BOARD.

Dominion Marketing Board.

3. (1) The Governor in Council may establish a board to be known as the Dominion Marketing Board to regulate the marketing of natural products as hereinafter provided.

Constitution of the Board.

(2) The Board shall consist of such number of persons as the Governor in Council may from time to time determine, and each member shall hold office during pleasure and shall receive such remuneration as the Governor in Council shall determine.

Chairman and quorum.

(3) One of the members of the Board shall be appointed by the Governor in Council as chairman, and such number of members as the Governor in Council shall determine shall constitute a quorum.

Members may act in respect of class of products.

(4) The Governor in Council may authorize certain members of the Board to exercise the functions of the Board in respect of any product or class of products.

Technical and other officers and employees.

(5) The Board may, with the approval of the Governor in Council, employ such technical, professional and other officers and employees as the Board may deem necessary or desirable, and such persons shall receive such salaries or remuneration as may be fixed by the Board with the approval of the Governor in Council.

Body corporate.

(6) The Board shall be a body corporate and shall have power for the purposes of this Act to acquire, hold and dispose of real and personal property.

Head office.

(7) The head office of the Board shall be in the city of Ottawa in the province of Ontario.

Duties of the Board.

(8) The Board shall, subject to the provisions of this Act, exercise the powers hereinafter conferred upon it, and shall advise the Minister from time to time on matters pertaining to the administration of this Act and regulations made thereunder.

Payments authorized.

(9) The Governor in Council may from time to time authorize payment to the Board out of moneys to be appropriated by Parliament of such sums of money as may be

necessary to assist in the organization of local boards, to defray the operating expenses of the Board incurred by it directly and any expenditure incurred or authorized by the Board under the authority of section nine hereof.

POWERS OF BOARD.

4. (1) The Board shall, subject to the provisions of this Act, have power
- |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |                                                                                      |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------|
| (a) to regulate the time and place at which, and to designate the agency through which the regulated product shall be marketed, to determine the manner of distribution, the quantity and quality, grade or class of the regulated product that shall be marketed by any person at any time, and to prohibit the marketing of any of the regulated product of any grade, quality or class;                                                                                                                                                                                                                                                                                    | Powers of Board.<br>Time and place of marketing, distribution, quantity and quality. |
| (b) to exempt from any determination or order any person or class of persons engaged in the production or marketing of the regulated product or any class, variety or grade of such product;                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | Exemptions.                                                                          |
| (c) to conduct a pool for the equalization of returns received from the sale of the regulated product; to compensate any person for loss sustained by withholding from the market or forwarding to a specified market any regulated product pursuant to an order of the Board; provided that no compensation shall be paid in respect of a regulated product that may be withheld from a particular market because the grade of such product is deemed by the Board to be unsuitable for such market, or because of restrictions imposed by the Government or other competent authority of any other country upon the importation of any regulated product into that country; | Pooling.<br>Compensation for loss.                                                   |
| (d) to compensate any person in respect of any shipment made pursuant to any determination or order of the Board to a country whose currency is depreciated, in relation to Canadian currency, for loss due to such depreciation;                                                                                                                                                                                                                                                                                                                                                                                                                                             | Compensation for depreciated currency.                                               |
| (e) to assist by grant or loan the construction or operation of facilities for preserving, processing, storing, or conditioning the regulated product and to assist research work relating to the marketing of such product;                                                                                                                                                                                                                                                                                                                                                                                                                                                  | Assistance by grant or loan.                                                         |
| (f) to require any or all persons engaged in the production or marketing of the regulated product to register their names, addresses and occupations with the Board, or to obtain a licence from the Board, and such licence shall be subject to cancellation by the Board for violation of any provision of this Act or regulation made thereunder;                                                                                                                                                                                                                                                                                                                          | Registration or licence.                                                             |



Full  
information  
and periodic  
returns.

(g) to require full information relating to the production and marketing of the natural product from all persons engaged therein and to require periodic returns to be made by such persons, and to inspect the books and premises of such persons;

Expenses.

(h) to pay the operating and necessary expenses of the Board;

Co-operation.

(i) to co-operate with any board or agency established under the law of any province to regulate the marketing of any natural product of such province and to act conjointly with any such provincial board or agency;

Board may  
authorize  
local  
board to  
exercise  
powers.

(2) Whenever a scheme for regulation by a local board has been approved, the Board may authorize the local board to exercise such of the powers of the Board as are outlined in this section and as may be necessary for the proper enforcement of the scheme of regulation, and may at any time withdraw from the local board authority to exercise any of its powers.

Board may  
require full  
information.

(3) The Board may require the local board to furnish full information from time to time relating to the production and marketing of the regulated product, and shall advise the local board in all matters relating to the exercise of its powers.

Board may  
establish  
a separate  
fund and  
impose  
charges  
and tolls.

(4) The Board, whether exercising the powers conferred by this Act or by provincial legislation, may establish a separate fund in connection with any scheme of regulation and for the purposes of such scheme may impose charges and tolls in respect of the marketing of the whole or any part of the regulated product, which charges and tolls shall be payable by such persons engaged in the production or marketing of the regulated product as the Board decides.

Local board  
may collect.

(5) Whenever a local board has been authorized to exercise any of the powers of the Board, the Board may authorize such local board to act as its agent to collect and disburse the charges or tolls imposed.

Agency  
may collect  
charges  
and tolls.

(6) Whenever the Board or a local board co-operates or acts conjointly with any board or agency established under the law of any province to regulate the marketing of any natural product, the Board may similarly impose charges or tolls in respect of the marketing of the whole or any part of the product marketed under the direction of such board or agency, and may authorize such board or agency to act as the agent of the Board in collecting and disbursing such charges or tolls.

Application  
of proceeds.

(7) A fund created by charges or tolls imposed in connection with a scheme of regulation may be utilized by the Board or by the local board if so authorized by the Board, for the purposes of such scheme including the creating of reserves, and in the case of charges or tolls imposed in respect of the marketing of any product under



the direction of any board or agency established under the law of any province to regulate the marketing of any natural product, the Board may direct that the charges or tolls be utilized by and for the purposes of such board or agency.

(8) Any charge or toll imposed by the Board pursuant to this section shall be a debt due to the Board, recoverable by legal action, and a certificate under the hand of a chief executive officer of the Board or of the local board, or board or agency established under the law of any province to regulate the marketing of any natural product, as the case may be, acting as agent of the Board as herein provided, shall be *prima facie* evidence that the amount stated therein is due.

Charge to be a debt due to the Board.

#### MARKETING SCHEMES.

5. (1) A representative number of persons engaged in the production and marketing or the production or marketing of a natural product may petition the Governor in Council to approve a scheme for the regulation of the marketing of such natural product by a local board under the supervision of the Board.

Petition to approve scheme.

(2) The petition shall be filed with the Minister and if he considers that the persons engaged in the production or marketing of the natural product are sufficiently represented by the petitioners, the scheme shall be referred to the Board with a request for a report on the expediency thereof.

Reference to Board.

(3) Upon receipt of a report from the Board recommending the approval of the scheme as submitted or as amended by the Board, the Minister may recommend the approval thereof, or may require that a poll be taken and state the necessary percentage of voters favouring the scheme to warrant its further consideration; upon the recommendation of approval by the Minister, the Governor in Council may approve the scheme and fix the date when the same shall become effective.

Minister may recommend approval.

(4) Before any scheme is approved the Governor in Council shall be satisfied,

(a) that the principal market for the natural product is outside the province of production; or

Conditions.

(b) that some part of the product produced may be exported.

(5) Every scheme shall state,

(a) the natural product to be the subject of the scheme of regulation;

Particulars.

(b) the proposed scheme in sufficient detail, including arrangements for a poll, if one is proposed, and for organization and administration under the supervision of the Board to enable consideration of the expediency thereof;

- (c) the powers hereinbefore mentioned which it is proposed shall be exercised by the local board under the Board;
- (d) if the scheme is to relate only to the product of a part of Canada, the geographical limits of such territory;
- (e) full information respecting the quantity of the said product produced and the markets therefor;
- (f) whether the scheme is to relate to the whole of the regulated product or to such part as is marketable outside the province of production or to such part as is exported from Canada;
- (g) the number of persons who shall comprise the local board and the basis of their selection;
- (h) the name and number of the local board; the place and address of the head office; the chief executive officers; the quorum required to approve any order or resolution; and how vacancies are to be filled;
- (i) any other information required by regulation or by the Minister.

Notice of approval of scheme.

**6.** (1) When a scheme has been approved by the Governor in Council, the Minister shall give public notice thereof in the *Canada Gazette*.

Scheme to have force of law.

(2) The provisions of the scheme as approved shall have the force of law, and the local board shall, from the date of the publication of the said notice of approval, be a body corporate.

Scheme to continue in force.

**7.** (1) Every scheme established hereunder shall continue in force until terminated by the Governor in Council.

Petition to revoke scheme.

(2) A representative number of the persons operating under a scheme approved under section five of this Act may petition the Minister to revoke the scheme.

Particulars of petition.

(3) The petition shall disclose to what extent the persons operating under the scheme are represented by those signing the petition and the Minister shall decide whether all those so engaged are sufficiently represented to justify him in considering the petition.

Poll to be taken before scheme is revoked.

(4) If a poll was taken in connection with the establishment of the scheme, a poll shall be taken before the scheme is revoked and the Minister shall state the necessary percentage of votes favouring revocation to warrant further consideration of the petition.

Revocation or approval.

(5) The Minister may, with the approval of the Governor in Council, grant the petition or refuse to revoke the scheme, as may best serve the public interest.

8. Whenever the Governor in Council is satisfied, on the recommendation of the Minister, that a majority of the persons engaged in the production or marketing of a natural product so require, he may approve of a proposal for,—

Approval of proposals for extension, amalgamation, and new local boards.

- (a) the extension of the geographical limits of any part of Canada to which an existing scheme relates;
- (b) the extension of the powers of any local board;
- (c) the amalgamation of two or more local boards;
- (d) the creation of a new local board to regulate the marketing of a product already subject to regulation by one or more existing local boards, provided that the existing local board or boards approve and that the powers of the new local board can be exercised consistently with the exercise of the powers of any existing local board or boards.

9. Notwithstanding any other provision of this Act the Minister may, if he is satisfied that the trade and commerce in a natural product is injuriously affected by marketing conditions through the lack of a local board, at any time propose a scheme for the marketing or the regulation of the marketing pursuant to section four of this Act of such product in interprovincial and/or export trade, and the Governor in Council may approve of such scheme and authorize the Board to administer such scheme directly or in co-operation with local boards, or through any agency which it may establish. Such scheme shall continue in force until terminated by the Governor in Council.

Minister may propose a scheme.

10. Whenever a scheme of regulation relates to an area of production which is confined within the limits of a province, the Governor in Council may authorize any marketing board or agency established under the law of the said province to be, and to exercise the functions of, a local board with reference to the said scheme.

Provincial marketing board.

11. The Board may exercise any power conferred upon it by or pursuant to provincial legislation with reference to the marketing of a natural product and may authorize a local board to exercise any such power.

Board may act under provincial legislation.

#### RESTRICTION OF IMPORTS AND EXPORTS.

12. The Governor in Council may by order or regulation, notice whereof shall be published forthwith in the *Canada Gazette*,—

Power to regulate or restrict imports and exports.

- (a) regulate or restrict the importation into Canada of any natural product which enters Canada in competition with a regulated product;



- (b) regulate or restrict the exportation from Canada of any natural product;
- (c) provide for the licensing of persons by whom any such natural product may be imported or exported;
- (d) prescribe the forms of such licences and the terms and conditions upon which the same may be issued, renewed, suspended or revoked by the Governor in Council.

#### REGULATIONS.

Regulations.

**13.** The Governor in Council may make such regulations as may be necessary for the efficient enforcement and operation of this Act and for carrying out the provisions thereof according to their true intent and meaning.

#### OFFENCES.

Failure to  
comply with  
orders or  
regulations.

**14.** Every person who fails to comply with any order of the Board or of a local board or any regulation of the Governor in Council shall be guilty of an offence and punishable on summary conviction with a fine of not less than twenty-five dollars and not more than five hundred dollars, or to imprisonment not exceeding three months, or to both fine and imprisonment.

#### REPORT.

Annual  
statement.

**15.** (1) At the end of each fiscal year, the Board shall transmit to the Minister a statement, signed by the chairman, of its affairs for the fiscal year in the form prescribed by the Governor in Council.

Laid before  
Parliament.

(2) A copy of such statement, if Parliament be then sitting, shall within fifteen days after receipt thereof by the Minister, be laid before Parliament, or if Parliament be not sitting, it shall be laid before Parliament within fifteen days after the commencement of the next ensuing session thereof.



## PART II.

### INVESTIGATIONS.

**16.** In this Part and in any regulation made hereunder, unless the context otherwise requires,—

(a) "committee" means a committee appointed hereunder by the Minister; Definitions.  
"Committee."

(b) "spread" means and includes— "Spread."

(i) the charge made by any person by way of commission, flat charge or otherwise for selling any natural or regulated product;

(ii) the charge made by any person for the storage, conditioning, re-conditioning, packing, wrapping or otherwise preparing for market any natural or regulated product;

(iii) the difference or spread between the price at which any natural or regulated product is purchased and the price at which it is sold;

(iv) the difference between the price at which any natural or regulated product is purchased and the sale price of the product resulting from the adaptation for sale, processing or conversion of the aforesaid natural or regulated product.

**17.** (1) The Minister may, at the request of the Board or upon his own initiative authorize an investigation into the cost of production, wages, prices, spread, trade practices, methods of financing, management policies, grading, transportation and other matters in relation to the production and marketing, adaptation for sale, processing or conversion of any natural or regulated product. Power to authorize investigations.

(2) The Minister may also require persons engaged in the production or marketing, adaptation for sale, processing or conversion of any natural or regulated product to submit at regular intervals or at any stated time, information demanded by the Minister in connection with the matters referred to in subsection one hereof. Information required may be submitted.

**18.** (1) Whenever as a result of any such investigation the Minister shall have reason to believe that such a situation exists as requires further inquiry he may at the request of the Board or on his own initiative appoint a committee to inquire into the spread in connection with the marketing, adaptation for sale, processing or conversion of a natural or regulated product. Committee to deal with spread.

(2) Such committee shall be composed of such number of representatives of producers and persons engaged in mark- Constitution of committee.

eting, adaptation for sale, processing or conversion, and consumers, as the Minister shall decide, and there shall be a representative of the Minister who shall act as chairman.

Powers of  
committee.

**19.** (1) A committee shall have power to investigate all operations occurring in connection with or in the course of marketing, adaptation for sale, processing or conversion of the natural or regulated product for the purpose of ascertaining the spread received by any person in the course of such marketing, adaptation for sale, processing or conversion.

Powers  
under  
*Inquiries Act*,  
R.S., c. 99.

(2) For the purposes of any such investigation or inquiry the Minister or such person as he may authorize to act on his behalf and the committee shall have the powers of a commissioner appointed under the *Inquiries Act*.

Determina-  
tion by  
committee.

**20.** A committee may after investigation as hereinbefore provided report to the Minister in connection with any operation occurring in the course of marketing, adaptation for sale, processing or conversion of the natural or regulated product, whether, in its opinion, the spread received is detrimental to or against the interest of the public in that it is excessive or results in undue enhancement of prices or otherwise restrains or injures trade or commerce in the natural or regulated product.

Publication  
of report.

**21.** (1) Any report of a committee shall within thirty days after its receipt by the Minister be made public, unless the committee is of the opinion that the public interest would be better served by withholding publication and so states in the report itself, in which case the Minister may exercise his discretion as to the publicity to be given to the report in whole or in part.

Copies.

(2) The Minister may publish and supply copies of any report in such manner and upon such terms as to him seems most desirable.

Penalty for  
infraction  
of provisions  
respecting  
spreads.

**22.** Every person who, to the detriment or against the interest of the public, charges, receives or attempts to receive any spread which is excessive or results in undue enhancement of prices or otherwise restrains or injures trade or commerce in the natural or regulated product, shall be guilty of an indictable offence and liable to a penalty not exceeding five thousand dollars or to two years' imprisonment, or, if a corporation, to a penalty not exceeding ten thousand dollars.

Evidence  
to be  
transmitted  
to  
Attorney  
General  
of province.

**23.** (1) Whenever in the opinion of a committee an offence has been committed against this Part, the Minister shall remit to the Attorney-General of any province within

which such alleged offence shall have been committed, for such action as such Attorney-General may be pleased to institute, the evidence taken on any investigation by a committee and the report of the committee.

(2) If within three months after remission aforesaid, or within such shorter period as the Governor in Council shall decide, no such action shall have been taken by or at the instance of the Attorney-General of the province as to the Governor in Council the case seems in the public interest to require, the Attorney-General of Canada may permit an information to be laid against such person or persons as in the opinion of the Attorney-General shall have been guilty of an offence against this Part.

If no action taken.

**24.** When an indictment is found against any person for any offence against this Part the accused shall have the option to be tried before the judge presiding at the court at which the indictment is found, or the judge presiding at any subsequent sitting of such court, or at any court where the indictment comes on for trial, without the intervention of a jury; and in the event of such option being exercised the proceedings subsequent thereto shall be regulated in so far as may be applicable by Part XVIII of the *Criminal Code*, respecting speedy trials of indictable offences.

Accused to have option.

**25.** The Minister shall at the end of the fiscal year prepare a report of the proceedings taken under this Part and shall lay the same before Parliament forthwith, or if Parliament be not then sitting, within fifteen days after the commencement of the next ensuing session.

Annual report.

Laid before Parliament.

**26.** If it be found that Parliament has exceeded its powers in the enactment of one or more of the provisions of this Act, none of the other or remaining provisions of the Act shall therefore be held to be inoperative or *ultra vires*, but the latter provisions shall stand as if they had been originally enacted as separate and independent enactments and as the only provisions of the Act; the intention of Parliament being to give independent effect to the extent of its powers to every enactment and provision in this Act contained.

If part of Act be *ultra vires*.



# STATUTES OF CANADA, 1935

## CHAPTER 64.

### An Act to amend The Natural Products Marketing Act, 1934.

[Assented to 5th July, 1935.]

**H**IS Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:— 1934, c. 57.

**1.** This Act may be cited as *The Natural Products Marketing Act Amendment Act, 1935*.

**2.** Section two of *The Natural Products Marketing Act, 1934*, is amended by repealing paragraph (e) thereof and substituting the following:— "Natural Product."

"(e) 'natural product' includes animals, meats, eggs, wool, dairy products, grains, seeds, fruit and fruit products, vegetables and vegetable products, maple products, honey, tobacco, lumber and such other natural product of agriculture and of the forest, sea, lake or river and such article of food or drink wholly or partly manufactured or derived from any such product, and such article wholly or partly manufactured or derived from a product of the forest as may be designated by the Governor in Council."

**3.** Subsection nine of section three of the said Act is repealed and the following is substituted therefor:—

"(9) The Governor in Council may from time to time authorize payment to the Board out of moneys to be appropriated by Parliament of such sums of money as may be necessary to assist in the organization of local boards, to make loans to local boards upon such terms as the Governor in Council approves, for the purpose of defraying operating expenses pending the receipt of charges and tolls, and to defray the operating expenses of the Board incurred by it directly and any expenditure incurred or authorized by the Board under the authority of section nine." Payments authorized.



**4.** Section four of the said Act is amended by adding thereto the following subsection:—

Equalization  
of returns.

“(9) Notwithstanding any provision of this Act, any scheme of regulation may provide solely for equalization to any extent, as between the producers, of the returns received from the sale of the regulated product.”

**5.** Section fourteen of the said Act is repealed and the following is substituted therefor:—

Failure to  
comply with  
orders or  
determina-  
tions or  
regulations.

“**14.** (1) Every person who fails to comply with any order or determination of the Board or of a local board or any regulation of the Governor in Council shall be guilty of an offence and punishable on summary conviction with a fine of not less than twenty-five dollars and not more than five hundred dollars, or to imprisonment not exceeding three months, or to both fine and imprisonment.

Burden of  
proof upon  
accused.

(2) In any prosecution under this Act or under any regulation it shall not be necessary for the prosecuting authority to prove that the product in respect of which the prosecution is instituted was produced within that part of Canada to which the scheme relates, and if the accused person pleads or alleges that the product was not produced within that part of Canada to which the scheme relates, the burden of proof thereof shall be upon the accused person.”

## JUDGMENT OF THE SUPREME COURT OF CANADA

---

IN THE MATTER OF A REFERENCE AS TO  
WHETHER THE PARLIAMENT OF CANADA  
HAD LEGISLATIVE JURISDICTION TO EN-  
ACT THE NATURAL PRODUCTS MARKET-  
ING ACT, 1934, BEING CHAPTER 57 OF THE  
STATUTES OF CANADA, 1934, AND ITS  
AMENDING ACT, THE NATURAL PRODUCTS  
MARKETING ACT AMENDMENT ACT, 1935,  
BEING CHAPTER 64 OF THE STATUTES OF  
CANADA, 1935. (1936)  
S.C.R. 398.

*Constitutional law—The Natural Products Marketing Act, 1934, 24-25  
Geo. V, c. 57, as amended in 1935 by 25-26 Geo. V, c. 64—Constitu-  
tional validity—Regulation of trade.*

*The Natural Products Marketing Act, 1934, and The Natural Products  
Marketing Act Amendment Act, 1935, are ultra vires of the Parliament  
of Canada.*

In effect, these statutes attempt and, indeed, profess, to regulate in the  
provinces of Canada, by the instrumentality of a commission or  
commissions appointed under the authority of the statute, trade in  
individual commodities and classes of commodities. The powers of  
regulation vested in the commissions extend to external trade and  
matters connected therewith and to trade in matters of interprovincial  
concern; but also to trade which is entirely local and of purely local

---

\*PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket, Davis and  
Kerwin JJ.

concern. Regulation of individual trades, or trades in individual commodities in this sweeping fashion, is not competent to the Parliament of Canada and such a scheme of regulation is not practicable "in view of the distribution of legislative powers enacted by the Constitution Act, without the co-operation of the provincial legislatures" (*Board of Commerce* case, [1922] 1 A.C. 191, at 201). The legislation is not valid as an exercise of the general authority of the Parliament of Canada under the introductory words of section 91, B.N.A. Act, to make laws "for the peace, order and good government of Canada."

1936  
REFERENCE  
re  
THE  
NATURAL  
PRODUCTS  
MARKETING  
ACT, 1934,  
AND ITS  
AMENDING  
ACT, 1935,

Duff C.J.

REFERENCE by His Excellency the Governor General in Council to the Supreme Court of Canada, in the exercise of the powers conferred by s. 55 of the *Supreme Court Act* (R.S.C., 1927, c. 35), of the following question: Is *The Natural Products Marketing Act*, 1934, as amended by *The Natural Products Marketing Act Amendment Act*, 1935, or any of the provisions thereof and in what particular or particulars or to what extent, *ultra vires* of the Parliament of Canada?

The Order in Council referring the question to the Court reads as follows:

The Committee of the Privy Council have had before them a report, dated 31st October, 1935, from the Minister of Justice, referring to the *Natural Products Marketing Act*, 1934, being chapter 57 of the statutes of Canada, 1934, and according to its long title "An Act to improve the methods and practices of marketing of natural products in Canada and in export trade, and to make further provision in connection therewith" and to its amending Act, *The Natural Products Marketing Act Amendment Act*, 1935, being chapter 64 of the statutes of Canada, 1935.

The Minister observes that doubts exist or are entertained as to whether the Parliament of Canada had jurisdiction to enact the said Acts, or either of them, in whole or in part, and that it is expedient that the question should be referred to the Supreme Court of Canada for judicial determination.

The Committee, accordingly, on the recommendation of the Minister of Justice, advise that the following question be referred to the Supreme Court of Canada, for hearing and consideration, pursuant to section 55 of the *Supreme Court Act*,—

Is *The Natural Products Marketing Act*, 1934, as amended by *The Natural Products Marketing Act Amendment*

1936  
 {  
 REFERENCE  
 re  
 THE  
 NATURAL  
 PRODUCTS  
 MARKETING  
 ACT, 1934,  
 AND ITS  
 AMENDING  
 ACT, 1935,  
 —  
 Duff C.J.  
 —

Act, 1935, or any of the provisions thereof and in what particular or particulars or to what extent, *ultra vires* of the Parliament of Canada?

E. J. LEMAIRE,  
*Clerk of the Privy Council.*

*The Natural Products Marketing Act, 1934*, by s. 3 authorizes the Governor in Council to establish a board, consisting of such number of persons as he may from time to time determine, to be known as the Dominion Marketing Board, to regulate the marketing of natural products as in the Act provided. By s. 2 (c) “‘marketing’ includes buying and selling, shipping for sale or storage and offering for sale.” By s. 2 (e) as amended “‘natural product’ includes animals, meats, eggs, wool, dairy products, grains, seeds, fruit and fruit products, vegetables and vegetable products, maple products, honey, tobacco, lumber and such other natural product of agriculture and of the forest, sea, lake or river and such article of food or drink wholly or partly manufactured or derived from any such product, and such article wholly or partly manufactured or derived from a product of the forest as may be designated by the Governor in Council.” The powers of the Board are made exercisable in respect of a “regulated product”; and this expression is defined by sec. 2 (g) as follows: “regulated product” means a natural product to which a scheme approved under this Act relates, but does not include (i) in case the said scheme relates only to the product of a part of Canada, such product in so far as it is produced outside that part of Canada; (ii) in case the said scheme relates only to the product marketed outside the province of production, such product in so far as it is marketed within the province of production; (iii) in case the said scheme relates only to the product exported, such product in so far as it is not exported. The powers of the Board are set forth in broad terms in par. (a) of sec. 4, ss. 1, of the Act as follows: “The Board shall, subject to the provisions of this Act, have power (a) to regulate the time and place at which, and to designate the agency through which the regulated product shall be marketed, to determine the manner of distribution, the quantity and quality, grade or class of the regulated product that shall be marketed by any person at any time, and to prohibit the marketing of any of the regulated product of any grade,



quality or class." Then follows a series of paragraphs in which are more specifically described the Board's functions and powers. To exempt from any determination or order any person or class of persons engaged in the production or marketing of the regulated product or any class, variety or grade of such product; to conduct a pool for the equalization of returns received from the sale of the regulated product and to compensate any person for loss sustained by withholding from the market or forwarding to a specified market any regulated product pursuant to an order of the Board, except in specified cases; to compensate any person in respect of any shipment made pursuant to any determination or order of the Board to a country whose currency is depreciated, in relation to Canadian currency, for loss due to such depreciation; to assist by grant or loan the construction or operation of facilities for preserving, processing, storing, or conditioning the regulated product and to assist research work relating to the marketing of such product; to require any or all persons engaged in the production or marketing of the regulated product to register their names, addresses and occupations with the Board, or to obtain a licence from the Board, subject to cancellation for violation of any provision of the Act or regulation made thereunder; to require returns of full information relating to the production and marketing of the natural product from all persons engaged therein and to inspect the books and premises of such persons; to pay the operating and necessary expenses of the Board; to co-operate with any board or agency established to regulate the marketing of any natural product of such province and to act conjointly with any such provincial board or agency. In addition, by sec. 4, ss. 2 to 8, inclusive, the Board is empowered whenever a scheme for regulation by a local board has been approved, to authorize the local board to exercise such of the powers of the Board outlined in s. 4 as may be necessary for the proper enforcement of the scheme of regulation, and at any time to withdraw such authority from the local Board; to require the local Board to furnish full information from time to time relating to the production and marketing of the regulated product and to advise the local board in all matters relating to the exercise of its powers; to impose (whether the Board be exercising the powers conferred by this Act or by provincial legislation or whenever

1936  
REFERENCE  
re  
THE  
NATURAL  
PRODUCTS  
MARKETING  
ACT, 1934,  
AND ITS  
AMENDING  
ACT, 1935,  
Duff C.J.

1936  
REFERENCE  
re  
THE  
NATURAL  
PRODUCTS  
MARKETING  
ACT, 1934,  
AND ITS  
AMENDING  
ACT, 1935,  
Duff C.J.

the Board or a local board co-operates or acts conjointly with any provincial board or agency) for the purposes of any scheme of regulation, charges and tolls in respect of the marketing of the whole or any part of the regulated product which shall be payable by such persons engaged in the production or marketing of the regulated product as the Board decides to authorize the local board or such provincial board or agency to act as its agent to collect and disburse the charges or tolls imposed; to utilize, or authorize the local board or provincial board or agency to utilize, the fund created by charges or tolls so imposed for the purposes of such scheme of regulation including the creation of reserves; and any charge or toll so imposed by the Board is declared to be a debt due to the Board recoverable by legal action. The "schemes" to which the Act applies are such marketing schemes as are approved by the Governor in Council and s. 5, ss. (4) provides as follows: (4) Before any scheme is approved the Governor in Council shall be satisfied, (a) that the principal market for the natural product is outside the province of production; or (b) that some part of the product produced may be exported. Under s. 5, ss. (1) schemes may be submitted for approval by a representative number of persons engaged in the production and marketing or the production or marketing of a natural product, or under s. 9 the Minister designated by the Governor in Council to administer the Act may propose a scheme for the marketing or the regulation of the marketing of a natural product in interprovincial or export trade whenever he is satisfied that the trade and commerce in such product is injuriously affected by marketing conditions through the lack of a local board. Section 10 provides that, whenever a scheme of regulation relates to an area of production which is confined within the limits of a province, the Governor in Council may authorize any marketing board or agency established under the law of that province to be, and to exercise the functions of, a local board with reference to the said scheme. Section 11 empowers the Board to exercise any power conferred upon it by or pursuant to provincial legislation with reference to the marketing of a natural product and to authorize the local board to exercise any such power. In point of fact each of the nine provinces in 1934 passed statutes to enable their respective governments to give

effect, in their respective provinces, to the provisions of the Dominion Act and regulations made thereunder. Section 12 authorizes the Governor in Council to regulate or restrict the importation into Canada of any natural product which enters Canada in competition with a regulated product or regulate or restrict the exportation from Canada of any natural product. Part II of the Act (ss. 16 to 26) provides for investigations by the Minister at the request of the Board or upon his own initiative, "into the cost of production, wages, prices, spread, trade practices, methods of financing, management, policies, grading, transportation and other matters in relation to the production and marketing, adaptation for sale, processing or conversion of any natural or regulated product." (s. 17). The term "spread" is defined in s. 16 (b) as follows: (b) "spread" means and includes: (i) the charge made by any person by way of commission, flat charge or otherwise for selling any natural or regulated product; (ii) the charge made by any person for the storage conditioning, re-conditioning, packing, wrapping or otherwise preparing for market any natural or regulated product; (iii) the difference or spread between the price at which any natural or regulated product is purchased and the price at which it is sold; (iv) the difference between the price at which any natural or regulated product is purchased and the sale price of the product resulting from the adaptation for sale, processing or conversion of the aforesaid natural or regulated product." Section 22 provides as follows: "22. Every person who, to the detriment or against the interest of the public, charges, receives or attempts to receive any spread which is excessive or results in undue enhancement of prices or otherwise restrains or injures trade or commerce in the natural or regulated product, shall be guilty of an indictable offence and liable to a penalty not exceeding five thousand dollars or to two years' imprisonment, or, if a corporation, to a penalty not exceeding ten thousand dollars." Sections 23 and 24 provide for prosecutions in a manner similar to that provided for in the *Combines Investigation Act*.

\* The judgment of the Court was delivered by

DUFF C.J.—Counsel on behalf of the Dominion based his argument in support of the validity of this statute

\* *Reporter's note:* Counsel on the argument of this Reference were the same as those mentioned at p. 365.

1936  
REFERENCE  
re  
THE  
NATURAL  
PRODUCTS  
MARKETING  
ACT, 1934,  
AND ITS  
AMENDING  
ACT, 1935,  
Duff C.J.



1936  
 {  
 REFERENCE  
 re  
 THE  
 NATURAL  
 PRODUCTS  
 MARKETING  
 ACT, 1934,  
 AND ITS  
 AMENDING  
 ACT, 1935,  
 Duff C.J.

upon two grounds. It is argued, first, that it is competent legislation under the general authority "to make laws for the peace, order and good government of Canada"; and, second, it is competent legislation in relation to matters coming within the second of the enumerated heads of section 91—"The regulation of trade and commerce." It will be convenient to discuss first the last mentioned ground.

In substance, we are concerned with sections 3, 4 and 5 of the statute.

By section 3, the Governor General is empowered to establish a Board to be known as the Dominion Marketing Board to regulate the marketing of natural products as hereinafter provided.

By section 4 (1) the Board is invested with power

(a) to regulate the time and place at which, and to designate the agency through which the regulated product shall be marketed, to determine the manner of distribution, the quantity and quality, grade or class of the regulated product that shall be marketed by any person at any time, and to prohibit the marketing of any of the regulated product of any grade, quality or class;

"Marketed" is used in an extended sense as embracing "buying and selling, shipping for sale or storage and offering for sale."

The Board is also empowered,

(c) to conduct a pool for the equalization of returns received from the sale of the regulated product; \* \* \*

(f) to require any or all persons engaged in the production or marketing of the regulated product to register their names, addresses and occupations with the Board, or to obtain a licence from the Board, and such licence shall be subject to cancellation by the Board for violation of any provision of this Act or regulation made thereunder;

Section 5 contains provisions for marketing schemes under which the marketing of a natural product, to which the scheme applies, is regulated by a local board under the supervision of the Dominion Board.

For the purposes of the discussion, it will not be necessary further to particularize the enactments of the statute. These enactments, in our opinion, are not enactments within the contemplation of the second head of section 91, "The regulation of trade and commerce" in the sense which has been ascribed to those words by decisions which are binding upon us and which it is our duty to follow.

It was argued by Mr. Rowell that two recent decisions, *Proprietary Articles Trade Association v. Attorney-General*



for Canada (1) and the *Aeronautics* Reference (2) manifest a departure by the Judicial Committee of the Privy Council from the principles governing the application of the residuary clause, as well as of this particular enactment which is also couched in very sweeping terms. In view of the argument addressed to us, and, in view of the character of the enactments under consideration, passed as recently as July, 1934, it would appear to be desirable, if not, indeed necessary, to review afresh the decisions and the grounds of the decisions by which this Court has hitherto supposed itself to be governed in the interpretation and application of head no. 2.

The judgment of the Board in *Parsons* case (3) contains the well known elucidation of the words "regulation of trade and commerce" which received the express approval of the Judicial Committee in *Wharton's* case (4). The later cases, in which the Board had to consider the scope of the sphere of jurisdiction designated by head no. 2 are the *Montreal Street Railway* case (5); *A.G. for Canada v. A.G. for Alberta* (6); the *Board of Commerce* case (7); *A.G. for B.C. v. A.G. for Canada* (8); *Toronto Electric Commissioners v. Snider* (9).

The discussion in *Parsons* case (10) has been many times considered and sometimes criticized. It is, we think, worth while to quote it in full (p. 112):

The words "regulation of trade and commerce," in their unlimited sense are sufficiently wide if uncontrolled by the context of other parts of the Act, to include every regulation of trade ranging from political arrangements in regard to trade with foreign governments, requiring the sanction of parliament, down to minute rules for regulating particular trades. But a consideration of the Act shews that the words were not used in this unlimited sense. In the first place, the collocation of No. 2 with classes of subjects of national and general concern affords an indication that regulations relating to general trade and commerce were in the mind of the legislature, when conferring this power on the Dominion parliament. If the words had been intended to have the full scope of which in their literal meaning they are susceptible, the specific mention of several of the other classes of subjects enumerated in section 91 would have been unnecessary; as 15, banking; 17, weights and measures; 18, bills of exchange and promissory notes; 19, interest; and even 21, bankruptcy and insolvency.

(1) [1931] A.C. 310.

(2) [1932] A.C. 54.

(3) (1881) 7 A.C. 96, at 112 *et seq.*

(4) [1915] A.C. 340.

(5) [1912] A.C. 33.

(6) [1916] 1 A.C. 588.

(7) [1922] 1 A.C. 191.

(8) [1924] A.C. 222.

(9) [1925] A.C. 396.

(10) (1881) 7 A.C. 96.

1936  
 {  
 REFERENCE  
 re  
 THE  
 NATURAL  
 PRODUCTS  
 MARKETING  
 ACT, 1934,  
 AND ITS  
 AMENDING  
 ACT, 1935,  
 Duff C.J.

"Regulation of trade and commerce" may have been used in some such sense as the words "regulations of trade" in the Act of Union between England and Scotland (6 Anne, c. 11), and as these words have been used in Acts of State relating to trade and commerce. Article V of the Act of Union enacted that all the subjects of the United Kingdom should have "full freedom and intercourse of trade and navigation" to and from all places in the United Kingdom and the Colonies; and Article VI enacted that all parts of the United Kingdom from and after the union should be under the *same* "prohibitions, restrictions, and *regulations of trade.*" Parliament has at various times since the Union passed laws affecting and regulating specific trades in one part of the United Kingdom only, without its being supposed that it thereby infringed the Articles of Union. Thus the Acts for regulating the sale of intoxicating liquors notoriously vary in the two kingdoms. So with regard to Acts relating to bankruptcy, and various other matters.

Construing, therefore, the words "regulation of trade and commerce" by the various aids to their interpretation above suggested, they would include political arrangements in regard to trade requiring the sanction of parliament, regulation of trade in matters of interprovincial concern, and it may be that they would include general regulations of trade affecting the whole Dominion. Their Lordships abstain on the present occasion from any attempt to define the limits of the authority of the Dominion parliament in this direction. It is enough for the decision of the present case to say that, in their view, its authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single province, and therefore that its legislative authority does not in the present case conflict or compete with the power over property and civil rights assigned to the legislature of Ontario by No. 13 of section 92.

Having taken this view of the present case, it becomes unnecessary to consider the question how far the general power to make regulations of trade and commerce, when competently exercised by the Dominion parliament, might legally modify or affect property and civil rights in the provinces, or the legislative power of the provincial legislatures in relation to those subjects;

The actual decision, it will be observed was that the authority to legislate for the regulation of trade and commerce does not contemplate the power to regulate by legislation the contracts of a particular business or trade in a single province. But the judgment suggests, although it does not decide, that this power of regulation does not extend to the unlimited regulation of particular trades and occupations. On the other hand, there is nothing in the judgment to indicate that the regulation of external trade is excluded from the scope of the authority, nor is there anything to suggest, whatever the precise scope of the power may be, that, when Parliament is legislating with reference to matters strictly within the regulation of trade and commerce, it is disabled from legislating in regard to

matters otherwise exclusively within the provincial authority if such legislation is necessarily incidental to the exercise of its exclusive powers in relation to that subject.

The subject was further elucidated by the judgment of the Judicial Committee in *A.G. for Canada v. A.G. for Alberta* (1). There it was held that this authority does not extend to regulation by a licensing system of "a particular trade in which Canadians would otherwise be free to engage in the provinces." Here again there is no suggestion that trade in a particular commodity, in so far as it is external trade or interprovincial trade, is not within the exclusive regulative authority of the Dominion.

It is convenient at this point to revert to the discussion of the subject which occurred in the *Montreal Street Railway* case (2). The judgment of the Board was written by Lord Atkinson, and the Board included Lord Loreburn and Lord MacNaghten. The controversy concerned the validity of an order made by the Board of Railway Commissioners under the authority of a provision of the Dominion Railways Act which required the owners of the Montreal Street Railway, a local work within the meaning of the 10th heading of section 92, and normally subject, exclusively to the control of the provincial legislature, to enter into an agreement with the owners of the Montreal Park and Island Railway which was a railway subject to the exclusive jurisdiction of the Parliament of Canada, and which connected with the street railway, in relation to the rates to be charged by the proprietors of the street railway in respect of through traffic passing over the street railway and the Park and Island Railway.

Admittedly, the legislature of Quebec had no authority to legislate in relation to such a matter as regards the Dominion undertaking, and on various grounds it was contended that the Dominion Parliament necessarily possessed authority to legislate in relation to through traffic and for the provincial railway in respect of such traffic. This authority was said to be bestowed by, *inter alia*, the residuary clause and by head no. 2 of section 91, "The regulation of trade and commerce." It was necessary for the determination of the appeal that their Lordships should pronounce upon both these contentions. They were examined

1936  
REFERENCE  
re  
THE  
NATURAL  
PRODUCTS  
MARKETING  
ACT, 1934,  
AND ITS  
AMENDING  
ACT, 1935,  
Duff C.J.

(1) [1916] 1. A.C. 588.

(2) [1912] A.C. 333.



1936  
 {  
 REFERENCE  
 re  
 THE  
 NATURAL  
 PRODUCTS  
 MARKETING  
 ACT, 1934,  
 AND ITS  
 AMENDING  
 ACT, 1935,  
 —  
 Duff C.J.  
 —

in a single passage which we now quote. From the judgment in *A.G. for Ontario v. A.G. for Canada* (1) their Lordships adduced the following principles as applicable to the case before them:

(1) that the exception contained in s. 91, near its end, was not meant to derogate from the legislative authority given to provincial legislatures by the 16th subsection of s. 92, save to the extent of enabling the Parliament of Canada to deal with matters, local or private, in those cases where such legislation is necessarily incidental to the exercise of the power conferred upon that Parliament under the heads enumerated in s. 91; (2) that to those matters which are not specified amongst the enumerated subjects of legislation in s. 91 the exception at its end has no application, and that in legislating with respect to matters not so enumerated the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to the provincial Legislature by s. 92; (3) that these enactments, ss. 91 and 92, indicate that the exercise of legislative power by the Parliament of Canada in regard to all matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any classes of subjects enumerated in s. 92; (4) that to attach any other construction to the general powers which, in supplement of its enumerated powers, are conferred upon the Parliament of Canada by s. 91 would not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces; and, lastly, that if the Parliament of Canada had authority to make laws applicable to the whole Dominion in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order and good government of the Dominion, there is hardly a subject upon which it might not legislate to the exclusion of provincial legislation. (1912, A.C. at p. 343).

Their Lordships then proceeded,

The same considerations appear to their Lordships to apply to two of the matters enumerated in s. 91, namely, the regulation of trade and commerce. Taken in their widest sense these words would authorize legislation by the Parliament of Canada in respect of several of the matters specifically enumerated in s. 92, and would seriously encroach upon the local autonomy of the province. In their Lordships' opinion these pronouncements have an important bearing on the question for decision in the present case, though the case itself in which they were made was wholly different from the present case, and the decision given in it has little if any application to the present case. They apparently established this, that the invasion of the rights of the province which the Railway Act and the Order of the Commissioners necessarily involve in respect of one of the matters enumerated in s. 92, namely, legislation touching local railways, cannot be justified on the ground that this Act and Order concern the peace, order and good government of Canada nor upon the ground that they deal with the regulation of trade and commerce.

The general expressions in this passage must, of course, be read in the light of the controversy with which their

(1) [1896] A.C. 491.



Lordships were dealing. They were, as we have seen, discussing the question raised as to the authority of the Dominion in exercise of its powers in regard to regulation of trade and commerce to legislate for a local work or undertaking of the character assigned, *prima facie*, exclusively to the jurisdiction of the province by section 92 (10). But the passage, as was pointed out in this court in *Lawson v. Interior Tree Fruit & Vegetable Committee* (1), signalizes the distinction between that which is national in its scope and concern and that which in each of the provinces is of private or local, that is to say, of provincial interest, which must be observed in deciding whether a particular enactment falls within the Dominion authority respecting the regulation of trade and commerce.

In *A.G. for B.C. v. A.G. for Canada* (2), the Board dealt with the subject of the regulation of external trade. The question before the Board in that case concerned the authority of the Dominion of Canada to impose customs duties upon alcoholic liquors imported into Canada by the Government of British Columbia for the purpose of sale by that government. It was pointed out in the judgment delivered by Lord Buckmaster; that the imposition of customs duties may have for its object regulation of trade and commerce, or it may have the twofold purpose of regulating trade and commerce and raising money; and it was held that section 125 of the B.N.A. Act, which prohibits the taxation of the property of the Crown, ought not to be so construed and applied as to interfere with the authority of the Parliament of Canada to regulate trade and commerce and to impose customs duties for that purpose.

This decision seems very plainly to involve the proposition that, by an enactment of the Parliament of Canada, trade in a particular commodity or class of commodities may be subjected to regulation through the instrumentality of customs duties.

There is another decision the mention of which ought not to be omitted, viz., the decision of 1885 of the Judicial Committee on the reference concerning the validity of the Dominion Liquor Licence Acts where their Lordships held that a system for the local licensing of the liquor trade was

1936  
REFERENCE  
re  
THE  
NATURAL  
PRODUCTS  
MARKETING  
ACT, 1934,  
AND ITS  
AMENDING  
ACT, 1935,  
Duff C.J.

(1) [1931] S.C.R. 357, at 367.

(2) (1924) A.C. 222.

1936  
 REFERENCE  
 TO  
 THE  
 NATURAL  
 PRODUCTS  
 MARKETING  
 ACT, 1934,  
 AND ITS  
 AMENDING  
 ACT, 1935,  
 Duff C.J.

beyond the competence of the Dominion Parliament to establish.

It would appear to result from these decisions that the regulation of trade and commerce does not comprise, in the sense in which it is used in section 91, the regulation of particular trades or occupations or of a particular kind of business such as the insurance business in the provinces, or the regulation of trade in particular commodities or classes of commodities in so far as it is local in the provincial sense; while, on the other hand, it does embrace the regulation of external trade and the regulation of inter-provincial trade and such ancillary legislation as may be necessarily incidental to the exercise of such powers.

There is another class of regulation which has been held to fall within the purview of head no. 2 (*John Deere Plow Co. v. Wharton* (1)): regulation which is auxiliary to some Dominion measure dealing with matters not falling within section 92, such, for example, as the incorporation of Dominion companies.

Obviously, these propositions do not furnish a complete definition of the authority given by the second subdivision of section 91. Logically, they leave scope for a possible jurisdiction in relation to "general trade and commerce" or in relation to "general regulations of trade applicable to the whole Dominion"—phrases employed in the judgment in *Parson's case*. Broadly speaking, they have their basis in the consideration mentioned in *Parsons case* (2) arising from the specification of particular subjects in section 91 and from the necessity to limit the natural scope of the words,

in order to preserve from serious curtailment, if not from virtual extinction, the degree of autonomy, which as appears from the scheme of the Act as a whole, the provinces were intended to enjoy. (*Lawson's case* (3)).

Restrictions upon the natural meaning of the words, in so far as they are dictated by force of such considerations, may properly be accepted as the necessary result of the application of settled principles of construction pursuant to which, from the beginning, it has been recognized that, in considering sections 91 and 92, the language of each must be read in light of the other and in some cases even modified for the purpose of giving effect to the two sections.

(1) [1915] A.C. 330.

(2) (1881) 7 A.C. 96.

(3) [1931] S.C.R. 357 at 366.

The necessity for some such restriction seems to be demonstrable by reference to the concluding clause of s. 91 which is in these words:

Any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces.

1936  
REFERENCE  
7c  
THE  
NATURAL  
PRODUCTS  
MARKETING  
ACT, 1934,  
AND ITS  
AMENDING  
ACT, 1935,

In *A.G. for Ontario v. A.G. for Canada* (1) it was held that the language of this exception was meant to include all matters enumerated within the sixteen heads of s. 92; and in *A.G. for Canada v. A.G. for Ontario* (2) it was laid down and decided that section 91 contains a legislative declaration that legislation upon any matter falling strictly within any of the classes of subjects specially enumerated in s. 91 is not within the competence, as matter of legislation, of a provincial legislature under s. 92.

Duff C.J.

Whenever \* \* \* a matter is within one of these specified classes, their Lordships said, legislation in relation to it by a Provincial Legislature is in their Lordships' opinion incompetent.

The decision in *Hodge v. The Queen* (3) that it is competent to a province to regulate by a local licensing system the trade in liquor seems incompatible with the contention that such local regulation of the trade in particular commodities is strictly within any of the classes of matters comprehended under the general words "The regulation of trade and commerce"; and this was the view taken by the Board in the case of *A.G. for Alberta v. A.G. for Canada* (4). Such was also, it would appear, the necessary effect of the judgment of the Board on the Reference in 1885 in relation to the Dominion Licensing Acts which has already been mentioned.

It does not seem to admit of serious dispute that, if, regards natural products, as defined by the Act, the provinces are destitute of the powers to regulate the dealing with natural products in respect of the matters designated in section 4 (1), a, the powers of the provinces are much more limited than they have generally been supposed to be. If this defect of power exists in relation to natural products

(1) (1896) A.C. 359.

(3) (1883) 9 A.C. 117.

(2) (1893) A.C. 700, at 715.

(4) [1928] A.C. 475.



1936  
 {  
 REFERENCE  
 re  
 THE  
 NATURAL  
 PRODUCTS  
 MARKETING  
 ACT, 1934,  
 AND ITS  
 AMENDING  
 ACT, 1935,  
 Duff C.J.

it exists in relation to anything that may be the subject of trade. Furthermore, if the Dominion has power to enact section 4 (1) f, as a provision falling strictly within "the regulation of trade and commerce," then the provinces are destitute of the power to regulate, by licensing persons engaged in the production, the buying and selling, the shipping for sale or storage and the offering for sale, in an exclusively local and provincial way of business of any commodity or commodities. The acceptance of this view of the powers of the provinces would seem to be inconsistent, not only with *Hodge v. The Queen* (1), but with the judgment in the *Montreal Street Railway* case (2) as well as with the judgment in the *Board of Commerce* case (3). The judgment in this latter case seems very plainly to declare that in the absence of very special circumstances such as those indicated in the judgment of the Board, such matters as subjects of legislation fall within the jurisdiction of the provinces under section 92.

The enactments in question, therefore, in so far as they relate to matters which are in substance local and provincial are beyond the jurisdiction of Parliament. Parliament cannot acquire jurisdiction to deal in the sweeping way in which these enactments operate with such local and provincial matters by legislating at the same time respecting external and interprovincial trade and committing the regulation of external and interprovincial trade and the regulation of trade which is exclusively local and of traders and producers engaged in trade which is exclusively local to the same authority (*King v. Eastern Terminal Elevators* (4)).

It should also be observed that these enactments operate by way of the regulation of dealings in particular commodities and classes of commodities. The regulations contemplated are not general regulations of trade as a whole or regulations of general trade and commerce within the sense of the judgment in *Parson's* case.

We come now to the judgments in the *Board of Commerce* case and *Snider's* case (5).

In *Snider's* case (5), the view of the Board is stated in the following passage:

(1) (1883) 9 A.C. 117.

(2) [1912] A.C. 33.

(3) [1922] 1 A.C. 191.

(4) [1925] S.C.R. 434.

(5) [1925] A.C. 396.



Nor does the invocation of the specific power in s. 91 to regulate trade and commerce assist the Dominion contention. In *Citizens Insurance Co. v. Parsons* (1), it was laid down that the collocation of this head (No. 2 of s. 91), with classes of subjects enumerated of national and general concern, indicates that what was in the mind of the Imperial Legislature when this power was conferred in 1867 was regulation relating to general trade and commerce. Any other construction would, it was pointed out, have rendered unnecessary the specific mention of certain other heads dealing with banking, bills of exchange and promissory notes, as to which it had been significantly deemed necessary to insert a specific mention. The contracts of a particular trade or business could not, therefore, be dealt with by Dominion legislation so as to conflict with the powers assigned to the Provinces over property and civil rights relating to the regulation of trade and commerce. The Dominion power has a really definite effect when applied in aid of what the Dominion Government are specifically enabled to do independently of the general regulation of trade and commerce, for instance, in the creation of Dominion companies with power to trade throughout the whole of Canada. This was shown in the decision in *John Deere Plow Co. v. Wharton* (2). The same thing is true of the exercise of an emergency power required, as on the occasion of war, in the interest of Canada as a whole, a power which may operate outside the specific enumerations in both ss. 91 and 92. And it was observed in *A.G. for Canada v. A.G. for Alberta* (3), in reference to attempted Dominion legislation about insurance, that it must now be taken that the authority to legislate for the regulation of trade and commerce does not extend to the regulation, for instance, by a licensing system, of a particular trade in which Canadians would otherwise be free to engage in the provinces. It is, in their Lordships' opinion, now clear that, excepting so far as the power can be invoked in aid of capacity conferred independently under other words in s. 91, the power to regulate trade and commerce cannot be relied on as enabling the Dominion Parliament to regulate civil rights in the provinces.

It is quite obvious that their Lordships are here not dealing with the regulation of external trade or the regulation of trade in matters of interprovincial concern. For our present purpose, it seems sufficient to say that their Lordships deemed it necessary or expedient for the purpose of dealing with an argument addressed to them to discuss the scope of the power conferred by head no. 2 of section 91; and that, on any conceivable construction of the words, it would appear to be impossible consistently with them to support the authority of the statute under consideration.

As to the decision on the *Aeronautics Reference* (4) and the *Radio Reference* (5), it does not seem necessary to enter upon a minute analysis of the judgments in those cases. The decision on the *Radio Reference* (5) proceeded on two grounds: first, for the reasons fully explained in the judg-

1936

REFERENCE  
re  
THE  
NATURAL  
PRODUCTS  
MARKETING  
ACT, 1934,  
AND ITS  
AMENDING  
ACT, 1935.

Duff C.J.

---

(1) (1881) 7 A.C. 96, at 112.

(3) [1916] 1 A.C. 588, at 596.

(2) [1915] A.C. 330, at 340.

(4) [1932] A.C. 54.

(5) [1932] A.C. 304.

1936  
 {  
 REFERENCE  
*re*  
 THE  
 NATURAL  
 PRODUCTS  
 MARKETING  
 ACT, 1934,  
 AND ITS  
 AMENDING  
 ACT, 1935.  
 Duff C.J.

ment, the legislation in question (being legislation for giving effect to an international obligation binding upon Canada) was within the ambit of the powers conferred by the residuary clause; and, second, that instruments employed in radio transmission fall within the class of undertakings which, by the combined operation of head no. 10 of section 92 and head no. 29 of section 91, are within the exclusive jurisdiction of Canada. In the last mentioned judgment it was pointed out that the decisions in the *Aeronautics Reference* (1) proceeded mainly upon the application of section 132. The subject-matters of the enactments and regulations actually or hypothetically considered in those two cases have no sort of resemblance to the subject matter of this legislation.

There is nothing in either of these judgments to justify an inference that their Lordships intended to overrule the long series of their own decisions hereinbefore mentioned; or the reasons upon which those decisions were founded.

There is one further observation which, perhaps, ought not to be omitted although it may be a mere corollary of what has already been said. Legislation necessarily incidental to the exercise of the undoubted powers of the Dominion in respect of the regulations of trade and commerce is competent although such legislation may trench upon subjects reserved to the provinces by section 92, but it cannot, we think, be seriously contended that sweeping regulation in respect of local trade, such as we find in this enactment, is, in the proper sense, necessarily incidental to the regulation of external trade or interprovincial trade or both combined.

The scheme of this statute in respect of its essential enactments would not appear to be practicable as a legislative scheme.

in view of the distribution of legislative powers enacted by the Constitution Act, without the co-operation of the provincial legislatures.

to quote from the judgment of the Judicial Committee in *Re the Board of Commerce Act* (2).

Turning now to the contention that this statute is a valid exercise of the power of Parliament under the introductory clause of section 91, there is a preliminary observation to be made. This argument has been pressed upon us in

(1) [1932] A.C. 54.

(2) [1922] 1 A.C. 191, at 201.

support of six of the statutes which have been referred to us for consideration. These are the statutes relating to the *Minimum Wages*, to *Limitation of Hours of Work*, to a *Weekly Rest Day*; to *Employment and Social Insurance*; to *Farmers' Creditors Arrangements* and to the statute immediately under consideration, the *Natural Products Marketing Act*. The discussion which follows was written with special reference to the first three of these statutes; the argument upon the reference relating to them being that, apart altogether from the circumstance that the subject matters of the enactments are subjects of international agreements in respect of which international obligations have been assumed, they are dealt with in aspects which do not fall under section 92 and can only be the subject matter of legislation under the initial clause of section 91. What follows, however, in substance pertains to the argument as presented in support of all the statutes mentioned and it has been thought convenient to produce it in this place.

It is important not to lose sight of the language of the statute itself. The initial words of section 91 empower the Queen by and with the advice and consent of the Senate and the House of Commons to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces.

By section 92,  
in each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects enumerated. These classes of subjects include (No. 13) Property and Civil Rights in the Province.

By section 94,  
Notwithstanding anything in this Act, the Parliament of Canada may make provision for the uniformity of all or any of the laws relative to property and civil rights in Ontario, Nova Scotia, and New Brunswick, and of the procedure of all or any of the courts in those three provinces, and from and after the passing of any Act in that behalf the power of the Parliament of Canada to make laws in relation to any matter comprised in any such Act shall, notwithstanding anything in this Act, be unrestricted; but any Act of the Parliament of Canada making provision for such uniformity shall not have effect in any province unless and until it is adopted and enacted as law by the legislature thereof.

Section 94, it will be observed, has no application to Quebec.

Language could not be more plain or, indeed, more explicit to declare that the subjects, Property and Civil

1936  
REFERENCE  
TO  
THE  
NATURAL  
PRODUCTS  
MARKETING  
ACT, 1934,  
AND ITS  
AMENDING  
ACT, 1935.  
Duff C.J.  
—



1936  
 {  
 REFERENCE  
 re  
 THE  
 NATURAL  
 PRODUCTS  
 MARKETING  
 ACT, 1934,  
 AND ITS  
 AMENDING  
 ACT, 1935.  
 —  
 Duff C.J.  
 —

Rights, are not subjects assigned to the Parliament of Canada under the initial words of section 91.

We are not concerned with the enumerated subjects assigned to Parliament under the second limb of that section; or with the concluding paragraph of the section which, as the Courts have recognized, has obviously no application to the first limb of the section, which alone is now pertinent.

It is settled by the decisions of the Judicial Committee that the phrase "Property and Civil Rights" is used in the "largest sense," subject, of course, to the limitations arising expressly from the exception of the enumerated heads of section 91, and impliedly from the specification of subjects in section 92.

It is to be observed, said the Board in *Citizens' Insurance Co. v. Parsons* (1), that the same words, "civil rights," are employed in the Act of 14 Geo. 3, c. 83, which made provision for the Government of the Province of Quebec. Section 8 of that Act enacted that His Majesty's Canadian subjects within the province of Quebec should enjoy their property, usages, and other civil rights, as they had before done, and that in all matters of controversy relative to property and civil rights resort should be had to the laws of Canada, and be determined agreeably to the said laws. In this statute the words "property" and "civil rights" are plainly used in their largest sense; and there is no reason for holding that in the statute under discussion they are used in a different and narrower one.

The legislation admittedly affects civil rights and interferes with, and controls, and regulates the exercise in every one of the provinces of the civil rights of the people in those provinces; but it is said that the real subject matter of the legislation is not these civil rights, which are controlled and regulated, but something else.

The initial clause of section 91 has been many times considered. There is no dispute now that the exception which excludes from the ambit of the general power all matters assigned to the exclusive authority of the legislatures must be given its full effect. Nevertheless, it has been laid down that matters normally comprised within the subjects enumerated in section 92 may, in extraordinary circumstances, acquire aspects of such paramount significance as to take them outside the sphere of that section.

The argument is mainly supported by two sentences in the judgment of the Board in *A.G. for Ontario v. A.G. for Canada* (2). The judgment of the Board in that case was

(1) (1881) 7 A.C. 96, at 111.

(2) [1896] A.C. 348.



directed to the answers to be given to certain questions submitted by the Governor General in Council to this Court, all of which questions immediately concerned the jurisdiction of a provincial legislature in respect of the prohibition of certain phases of the liquor traffic. The two sentences occur in the discussion of the seventh question which relate to the jurisdiction of the Ontario Legislature to enact a section of a statute of that Province entitled "An Act respecting local option in the matter of liquor selling." In the course of that discussion, their Lordships dealt with the general authority given to the Parliament of Canada under the first of the introductory enactments of section 91 which is quoted above, and their Lordships observed,

\* \* \* to those matters which are not specified among the enumerated subjects of legislation, the exception from s. 92, which is enacted by the concluding words of s. 91, has no application; and, in legislating with regard to such matters, the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to provincial legislatures by s. 92. These enactments appear to their Lordships to indicate that the exercise of legislative power by the Parliament of Canada, in regard to all matters not enumerated in s. 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in s. 92. To attach any other construction to the general power which, in supplement of its enumerated powers, is conferred upon the Parliament of Canada by s. 91, would, in their Lordships' opinion, not only be contrary to the intentment of the Act, but would practically destroy the autonomy of the provinces. If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order and good government of the Dominion, there is hardly a subject enumerated in s. 92 upon which it might not legislate, to the exclusion of the provincial legislatures.

Their Lordships proceeded, in the two sentences which are now mainly relied upon,

Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial, and therefore within the jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial, and has become matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada.

It seems to us right, if these two sentences are to be properly understood, that they should be read with the preceding sentences; and experience seems to shew that there

1936  
REFERENCE  
re  
THE  
NATURAL  
PRODUCTS  
MARKETING  
ACT, 1934,  
AND ITS  
AMENDING  
ACT, 1935.  
Duff C.J.

1936  
 {  
 REFERENCE  
 re  
 THE  
 NATURAL  
 PRODUCTS  
 MARKETING  
 Act, 1934,  
 AND ITS  
 AMENDING  
 Act, 1935.  
 Duff C.J.  
 —

has been a disposition not to attend to the limits implied in the carefully guarded language in which the Board expressed itself. It has been assumed, apparently, that they lay down a rule of construction the effect of which is that all matters comprised in any one of the enumerated subdivisions of section 92 may attain "such dimensions as to . . . cease to be merely local or provincial" and become in some other aspect of them matters relating to the "peace, order and good government of Canada" and subject to the legislative jurisdiction of the Parliament of Canada.

The difficulty of applying such a rule to matters falling within the first subdivision, for example, of section 92, which relates to the amendment of the provincial constitutions "notwithstanding anything in this Act," must be very great. On the face of the language of the statute, the authority seems to be intended to be absolute. In other words, it seems to be very clearly stated that matters comprised within the subject matter of the constitution of the province "except as regards the office of Lieutenant-Governor" are matters local and provincial, and that they are not matters which can be comprised in any of the classes of subjects of section 91.

Then the decision in the *Montreal Park & Island Railway v. City of Montreal* (1) seems to be final upon the point that local works and undertakings, subject to the exceptions contained in subdivision no. 10 of section 92 and matters comprised within that description, are matters local and provincial within the meaning of section 92 and excepted from the general authority given by the introductory enactment of section 91.

The same might be said of the solemnization of marriage in the province. Marriage and divorce are given without qualification to the Dominion under subdivision 26 of section 91, but the effect of section 92 (12), it has been held, is to exclude from the Dominion jurisdiction in relation to marriage and divorce the subject of solemnization of marriage in the province. It is very difficult to conceive the possibility of solemnization of marriage, in the face of this plain declaration by the legislature, assuming aspects which would bring it within the general authority of the

(1) [1912] A.C. 333.

Dominion in relation to peace, order and good government, in such fashion, for example, as to enable the Dominion to prohibit or to deprive of legal effect a religious ceremony of marriage. The like might be said of no. 2, Taxation within the Province; the Borrowing of Monies on the Sole Credit of the Province; Municipal Institutions in the Province; and the Administration of Justice, including the constitution of the Courts and Procedure in Civil Matters in the Courts.

1936  
REFERENCE  
re  
THE  
NATURAL  
PRODUCTS  
MARKETING  
ACT, 1934,  
AND ITS  
AMENDING  
ACT, 1935.  
Duff C.J.

In the *Manitoba Licence Holders* case (1), Lord Macnaghten, speaking for a Board which included Lord Hobhouse, Lord Davey, Lord Robertson and Lord Lindley, said that, in their Lordships' view, it was doubtful if the Canada Temperance Act could be sustained as valid legislation by the Dominion on the assumption that the matter of statute was comprised within section 13.

\* \* \* a careful perusal of the judgment (in *A.G. for Ontario v. A.G. for the Dominion* (2)), leads to the conclusion that, in the opinion of the Board, the case fell under No. 16 rather than under No. 13. And that seems to their Lordships to be the better opinion (3).

The judgment proceeds:—

Indeed, if the case is to be regarded as dealing with matters within the class of subjects enumerated in No. 13, it might be questionable whether the Dominion Legislature could have authority to interfere with the exclusive jurisdiction of the province in the matter.

Lord Davey, who took part in this judgment, was a member of the Board which pronounced the judgment containing the two sentences under discussion.

As we have said, Lord Watson's language is carefully guarded. He does not say that every matter which attains such dimensions as to effect the body politic of the Dominion falls thereby within the introductory matter of section 91. But he said that "some matters" may attain such dimensions as to affect the body politic of the Dominion and, as we think the sentence ought to be read having regard to the context, in such manner and degree as may "justify the Canadian Parliament in passing laws for their regulation or abolition. . . ." So, in the second sentence, he is not dealing with all matters of "national concern" in the broadest sense of those words, but only those which are matter of national concern "in

(1) [1902] A.C. 73.

(2) [1896] A.C. 348.

(3) [1902] A.C. 78.



1936  
 {  
 REFERENCE  
 re  
 THE  
 NATURAL  
 PRODUCTS  
 MARKETING  
 ACT, 1934,  
 AND ITS  
 AMENDING  
 ACT, 1935.  
 Duff C.J.  
 —

such sense" as to bring them within the jurisdiction of the Parliament of Canada.

The application of the principle implicit in this passage must always be a delicate and difficult task. That is shewn by reference to the history of the Canada Temperance Act. The prohibitory clauses of the legislation undoubtedly do affect civil rights directly but, in *Russell v. The Queen* (1), the Board took the view that the real subject matter of the legislation was not property and civil rights, but matter connected with public order and having a close relation to the criminal law. It was likened to "laws which place restrictions on the sale or custody of poisonous drugs, or of dangerously explosive substances . . . on the ground that the free sale or use of them is dangerous to public safety, and making it a criminal offence . . . to violate these restrictions. . . ." It was described as "legislation . . . relating to public order and safety," and belonging to the class of "Laws . . . for the promotion of public order, safety, or morals, and which subject those who contravene them to criminal procedure and punishment. . . ."

Unfortunately, on this point, the case was unargued, Mr. Benjamin conceding that the enactments would have fallen within the general authority of the Dominion if it had been brought into force immediately throughout every part of the Dominion. The difficulty has been pointed out more than once of reconciling this decision with the subsequent decision of a very powerful Board in the Dominion Liquor Licence case, in which an Act of the Dominion Parliament regulating by licence the sale of liquor throughout the Dominion was held to be *ultra vires* notwithstanding the following preamble:

Whereas it is desirable to regulate the traffic in the sale of intoxicating liquor, and it is expedient that the law respecting the same should be uniform throughout the Dominion, and that provision should be made in regard thereto for the better preservation of peace and order; And, in the judgment of Lord Watson in *A.G. for Ontario v. A.G. for Canada* (2) it is observed (p. 362):

The judgment of this Board in *Russell v. Regina* (2) has relieved their Lordships from the difficult duty of considering whether the Canada Temperance Act of 1886 relates to the peace, order and good government of Canada, in such sense as to bring its provisions within the competency of the Canadian Parliament.

(1) (1881) 7 A.C. 829.

(2) [1896] A.C. 348.



*Russell v. The Queen* (1) has been explained in a more recent decision and we shall come to that in a moment. The point we are now concerned with is this: The question whether the prohibition and the regulation of the right to manufacture or deal in intoxicating liquors throughout the Dominion could, by reason of its analogy to legislation regulating or suppressing the sale of poisonous drugs or explosives, the manufacture and sale of poisonous drugs and explosives, and the connection between the matters dealt with and public order and the criminal law, be justified as legislation within the initial clause of section 91 is a question in respect of which the great judges who had to consider the cases we have mentioned found themselves in doubt and difficulty. Lord Watson's admonition to the courts to observe "great caution" in considering such matters is one that will not be lightly disregarded by prudent judges. The words of the passage in Lord Watson's judgment in themselves are not intended, obviously, to provide a test for determining in any given case whether a matter falling within "Property and Civil Rights" in the province has acquired such aspects as to take it out of the classes of subjects dealt with in section 92. The interpretation of Lord Watson's language in this sense by the judgment of the Board in *Montreal v. Montreal Street Railway* (2) is, if we may say so, fully justified by that judgment when read as a whole. We may add that Lord Macnaghten, who wrote the judgment in the *Manitoba Licence Holders* case (3), was also a member of the Board who decided the *Montreal* case (2). In performing the very difficult task of deciding upon such questions, the courts must have regard to the provisions of the B.N.A. Act as a whole and to the practical application of the introductory enactment of section 91 in the decisions of the courts. In considering these decisions, it is important to read what is said in the light of the thing that was decided; and it is fundamental that the interpretation and application of sections 91 and 92 of the B.N.A. Act cannot be controlled by particular expressions used in a judgment torn from their context and given the broadest meaning of which the words are capable without any reference

1936  
REFERENCE  
THE  
NATURAL  
PRODUCTS  
MARKETING  
ACT, 1934,  
AND ITS  
AMENDING  
ACT, 1935.  
Duff C.J.

(1) (1881) 7 A.C. 829.

(2) [1912] A.C. 333.

(3) [1902] A.C. 73.

1936  
 REFERENCE  
 re  
 THE  
 NATURAL  
 PRODUCTS  
 MARKETING  
 ACT, 1934,  
 AND ITS  
 AMENDING  
 ACT, 1935.

Duff C.J.

to that context or to the particular controversy to which the language was directed.

The necessity for Lord Watson's admonition becomes more clear when we recall that there is only one case in which the Judicial Committee has held that legislation with regard to matters which were admittedly *ex facie* civil rights within a province, had by reason of exceptional circumstances acquired aspects and relations bringing them within the ambit of the introductory clause. That case is *Fort Frances Pulp & Power Co. v. Manitoba Press* (1).

Before dealing with the *Fort Frances* case (1), it will be necessary to refer to two other decisions, in the *Board of Commerce Act* case (2) and in *Toronto Electric Commissioners v. Snider* (3).

In the Board of Commerce case the Judicial Committee had to consider legislation by which a Dominion Board was constituted and empowered, broadly speaking, to inquire into, and prohibit, profiteering and practices in connection therewith in dealings in the necessities of life. In particular, the Board had authority to regulate the prices of such necessities of life.

The question arose upon a case stated as to the validity of an order made by the Board regulating the prices of ready made clothing in certain establishments in Ottawa. The validity of the order was attacked by the associations of manufacturers concerned and was supported by counsel on behalf of the Board and of the Dominion. The litigation raised the concrete question *inter partes* as to the legality of the particular order; and the answer to that question turned upon the answer to the question concerning the validity of the legislation, which it was, therefore, essential to determine. The statute was supported on various grounds and, among others, on the ground that in the year 1919, when it was enacted, the evils of hoarding and high prices in respect of the necessities of life had attained such dimensions "as to affect the body politic of Canada." Nobody denied the existence of the evil. Nobody denied that it was general throughout Canada. Nobody denied the importance of suppressing it. Nobody denied that it prejudiced and seriously prejudiced the well being of the

(1) [1922] A.C. 695.

(2) [1922] 1 A.C. 191.

(3) [1925] A.C. 396.

people of Canada as a whole, or that in a loose, popular sense of the words it "affected the body politic of Canada." Nevertheless, it was held that these facts did not constitute a sufficient basis for the exercise of jurisdiction by the Dominion Parliament under the introductory clause in the manner attempted. The Board said that in special circumstances, such as those of a great war, the interest of the Dominion in the matters might conceivably become of such paramount and overriding importance as to lie outside the heads of section 92 and not be covered by them. But it is, they held, quite another matter to say that under normal circumstances, general Canadian policy can justify interference, on the scale of the statutes than in controversy, with the property and civil rights of the inhabitants of the provinces.

It has already been observed that circumstances are conceivable, such as those of war or famine, when the peace, order and good government of the Dominion might be imperilled under conditions so exceptional that they require legislation of a character in reality beyond anything provided for by the enumerated heads in either s. 92 or s. 91 itself. Such a case, if it were to arise, would have to be considered closely before the conclusion would properly be reached that it was one which could not be treated as falling under any of the heads enumerated. Still, it is a conceivable case, and although great caution is required in referring to it, even in general terms, it ought not, in the view their Lordships take of the British North America Act, read as a whole, to be excluded from what is possible. For throughout the provisions of that Act there is apparent the recognition that subjects which would normally belong exclusively to a specifically assigned class of subject may, under different circumstances and in another aspect, assume a further significance. Such an aspect may conceivably become of paramount importance, and of dimensions that give rise to other aspects. This is a principle which, although recognized in earlier decisions, such as that of *Russell v. The Queen* (1), both here and in the Courts of Canada, has always been applied with reluctance, and its recognition as relevant can be justified only after scrutiny sufficient to render it clear that the circumstances are abnormal. In the case before them, however important it may seem to the Parliament of Canada that some such policy as that adopted in the two Acts in question should be made general throughout Canada, their Lordships do not find any evidence that the standard of necessity referred to has been reached, or that the attainment of the end sought is practicable, in view of the distribution of legislative powers enacted by the Constitution Act, without the co-operation of the Provincial Legislatures (2).

The reluctance of the Courts to give effect to such arguments as that now under consideration is illustrated also in *Snider's case* (3). The legislation in question there was

1936  
REFERENCE  
re  
THE  
NATURAL  
PRODUCTS  
MARKETING  
ACT, 1934,  
AND ITS  
AMENDING  
ACT, 1935.  
Duff C.J.

(1) (1881) 7 A.C. 829.

(2) [1922] 1 A.C. 191, at 200.

(3) [1925] A.C. 396.



1936  
 REFERENCE  
 TO  
 THE  
 NATURAL  
 PRODUCTS  
 MARKETING  
 ACT, 1934,  
 AND ITS  
 AMENDING  
 ACT, 1935.  
 Duff C.J.

framed for the purpose of dealing with industrial disputes and authorized the Minister of Labour to take steps to convene, in the case of such a dispute, a Board composed of a representative of the workmen, a representative of the employer, and a third person to be nominated by the Minister of Labour himself. The Act prohibited a strike or lock-out pending the consideration of a dispute by the Board. The importance of the matters dealt with by the statute, the fact that the statute was making a provision for meeting a condition which prevailed throughout the whole of Canada and for dealing with industrial disputes which, in many and, indeed, most cases, would affect people in more than one province, the fact that the machinery provided had proved to be a valuable instrument in the interests of industrial peace, were not disputed. Nevertheless, the Board negatived the existence of

the general principle that the mere fact that Dominion legislation is for the general advantage of Canada, or is such that it will meet a mere want which is felt throughout the Dominion, renders it competent if it cannot be brought within the heads enumerated specifically in section 91.

The judgment of the Board proceeds:—

No doubt there may be cases arising out of some extraordinary peril to the national life of Canada, as a whole, such as the cases arising out of a war, where legislation is required of an order that passes beyond the heads of exclusive Provincial competency. Such cases may be dealt with under the words at the commencement of s. 91, conferring general powers in relation to peace, order and good government simply because such cases are not otherwise provided for. But instances of this, as was pointed out in the judgment in *Fort Frances Pulp & Paper Co. v. Manitoba Free Press* (1) are highly exceptional. Their Lordships think that the decision in *Russell v. The Queen* (2) can only be supported to-day, not on the footing of having laid down an interpretation, such as has sometimes been invoked in the general words at the beginning of s. 91, but on the assumption of the Board, apparently made at the time of deciding the case of *Russell v. The Queen* (2), that the evil of intemperance at that time amounted in Canada to one so great and so general that at least for the period it was a menace to the national life of Canada so serious and pressing that the National Parliament was called on to intervene to protect the nation from disaster. An epidemic of pestilence might conceivably have been regarded as analogous. It is plain from the decision in the *Board of Commerce* case (3) that the evil of profiteering could not have been so invoked, for Provincial Powers, if exercised, were adequate to it. Their Lordships find it difficult to explain the decision in *Russell v. The Queen* (4) as more than a decision of this order upon facts, considered to have been established at its date rather than upon general law.

The principle enunciated in this last paragraph had been applied in the *Fort Frances* case (1), the authority of which

(1) [1923] A.C. 695.

(2) (1881) 7 A.C. 829.

(3) [1922] 1 A.C. 191.

(4) [1932] A.C. 71.



seems to be recognized in the judgment in the *Aeronautics Reference* (1).

On behalf of the Dominion it is argued that the judgment in the *Aeronautics case* (1) constitutes a new point of departure. The effect of that judgment, it seems to be argued, is that if, in the broadest sense of the words, the matters dealt with are matters "of national concern" matters which "affect the body politic of the Dominion" jurisdiction arises under the introductory clause. One sentence is quoted from the judgment in the *Aeronautics case* (1) which we will not reproduce because we do not think their Lordships can have intended in that sentence to promulgate a canon of construction for sections 91 and 92. We see nothing in the judgment in the *Aeronautics case* (1) to indicate that their Lordships intended to detract from the judicial authority of the decisions in the *Combines case* (2) and *Snider's case* (3).

In the *Aeronautics case* (1), it is true, their Lordships called attention to the circumstance that, by section 132, the Dominion possesses powers to legislate in relation to matters which, in the domestic sense, would fall within section 92 when these matters have become affected by an international obligation by which Canada is bound; and in the subsequent case, reported in the same volume of the Appeal Cases, the *Radio Reference* (4), it was held that matters affected by an obligation arising under an international arrangement not falling within section 132, but constituted in virtue of powers acquired in course of the recent constitutional developments, would fall within the general authority of section 91 because such international obligations were not comprehended within any of the specific subjects enumerated within section 91 or section 92; and in the *Aeronautics case* (1), as already observed, the authority of the decision in the *Fort Frances case* (5) is expressly recognized. The judgments in the *Combines case* (2), the *Fort Frances case* (5), *Snider's case* (3), obviously have no reference to legislation dealing with matters of civil right

1936  
REFERENCE  
re  
THE  
NATURAL  
PRODUCTS  
MARKETING  
ACT, 1934,  
AND ITS  
AMENDING  
ACT, 1935.  
Duff C.J.

(1) [1932] A.C. 71

(3) [1925] A.C. 396.

(2) [1922] 1 A.C. 191.

(4) [1932] A.C. 305.

(5) [1923] A.C. 695.

1936  
 {  
 REFERENCE  
 re  
 THE  
 NATURAL  
 PRODUCTS  
 MARKETING  
 ACT, 1934,  
 AND ITS  
 AMENDING  
 ACT, 1935.  
 ———  
 Duff C.J.

from the international point of view. We are bound, in our view, by the decisions in the *Combines* case (1) and in *Snider's* case (2) as well as by the decision in the *Fort Frances* case (3), and, consistently with those decisions, we do not see how it is possible that the argument now under discussion can receive effect.

To summarize: in effect, this statute attempts and, indeed, professes, to regulate in the province of Canada, by the instrumentality of a commission or commissions appointed under the authority of the statute, trade in individual commodities and classes of commodities. The powers of regulation vested in the commissions extend to external trade and matters connected therewith and to trade in matters of interprovincial concern; but also to trade which is entirely local and of purely local concern.

Regulation of individual trades, or trades in individual commodities in this sweeping fashion, is not competent to the Parliament of Canada and such a scheme of regulation is not practicable

in view of the distribution of legislative powers enacted by the Constitution Act, without the co-operation of the provincial legislatures to quote from the judgment of the Judicial Committee in the *Board of Commerce* case (4).

The legislation, for the reasons given, is not valid as an exercise of the general authority of the Parliament of Canada under the introductory words of section 91 to make laws "for the peace, order and good government of Canada."

---

(1) [1932] 1 A.C. 191.

(2) [1925] A.C. 396.

(3) [1923] A.C. 695.

(4) [1922] 1 A.C. 191 at 201.

JUDGMENT OF THE LORDS OF THE JUDICIAL  
COMMITTEE OF THE PRIVY COUNCIL,  
DELIVERED THE 28th JANUARY, 1937

IN THE MATTER of a Reference as to whether the Parliament of Canada had legislative jurisdiction to enact The Natural Products Marketing Act, 1934, and its amending Act The Natural Products Marketing Act Amendment Act, 1935,

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA

*Appellant*

v.

THE ATTORNEY-GENERAL OF CANADA AND OTHERS

*Respondents*

---

Present at the hearing:

LORD ATKIN.

LORD THANKERTON.

LORD MACMILLAN.

LORD WRIGHT (Master of the Rolls).

Sir SIDNEY ROWLATT.

(Delivered by Lord Atkin.)

---

This is an appeal from the Supreme Court on a reference by the Governor General in Council dated 5th November, 1935, raising the question whether the Natural Products Marketing Act, 1934, as amended by the Natural Products Marketing Act Amendment Act, 1935, is *ultra vires* of the Parliament of Canada. The Supreme Court unanimously answered the question in the affirmative.

The Act consists of two parts. The first provides for the establishment of a Dominion Marketing Board whose powers include powers to regulate the time and place at which and the agency through which natural products to which an approved scheme relates shall be marketed and to determine the manner of distribution and the quantity, quality, grade or class of the product that shall be marketed by any person at any time and to prohibit the

marketing of any of the regulated products of any grade, quality or class.

There are other regulatory powers which need not be further specified. A scheme to regulate the marketing of a natural product is initiated by a representative number of persons engaged in the production or marketing of the natural product. It can be referred by the appropriate Minister to the Board and if they approve the scheme as submitted or amended by them and it is further approved by the Minister the Governor General in Council may approve the scheme. It is essential that the Governor General in Council shall be satisfied either that the principal market for the natural product is outside the province of production or that some part of the product produced may be exported. The latter provision makes it clear that the regulation may apply to marketing transactions in natural products which have nothing to do with foreign export or inter-provincial trade. If the Minister is satisfied that trade and commerce in a natural product are injuriously affected by the absence of a scheme prepared as above he may himself propose a scheme for approval of the Governor in Council. The Governor in Council is given power by order or regulation to regulate or restrict importation into Canada of a natural product which enters Canada in competition with a regulated product: and to regulate or restrict the exportation from Canada of any natural product. Part II contains provision for the appointment by the Minister of a Committee who may be entrusted with the duty of investigating all matters connected with the production or marketing of natural or regulated products for the purpose of ascertaining the charges made in distribution of a natural or regulated product. The receipt against the interest of the public of an excessive charge is made an indictable offence and there are provisions for the trial of such offences.

There can be no doubt that the provisions of the Act cover transactions in any natural product which are completed within the province, and have no connection with inter-provincial or export trade. It is therefore plain that the Act purports to affect property and civil rights in the province, and if not brought within one of the enumerated classes of subjects in section 91 must be beyond the competence of the Dominion Legislature. It was sought to bring the Act within the class (2) of section 91, namely The Regulation of Trade and Commerce. Emphasis was laid upon those parts of the Act which deal with inter-provincial and export trade. But the regulation of trade and commerce does not permit



the regulation of individual forms of trade or commerce confined to the province. In his judgment the Chief Justice says:—

“The enactments in question, therefore, in so far as they relate to matters which are in substance local and provincial are beyond the jurisdiction of Parliament. Parliament cannot acquire jurisdiction to deal in the sweeping way in which these enactments operate with such local and provincial matters by legislating at the same time respecting external and interprovincial trade and committing the regulation of external and interprovincial trade and the regulation of trade which is exclusively local and of traders and producers engaged in trade which is exclusively local to the same authority (King v. Eastern Terminal Elevators (1925) S.C.R. 434).”

Their Lordships agree with this; and find it unnecessary to add anything. There was a further attempt to support the Act upon the general powers to legislate for the peace, order and good government of Canada. Their Lordships have already dealt with this matter in their previous judgments in this series and need not repeat what is there said. The judgment of the Chief Justice in this case is conclusive against the claim for validity on this ground. In the result therefore there is no answer to the contention that the Act in substance invades the provincial field and is invalid. It was however urged before us that portions of the Act notably section 9 in the first part and the whole of part II are within the competence of Parliament. Section 9 because it only purports to deal with inter-provincial or export trade and part II because it goes no further than the similar provisions in the Combines Investigation Act and is a genuine exercise of the Dominion legislative authority over criminal law. Reference was made to section 26 of the Act which is in these terms:—

“If it be found that Parliament has exceeded its powers in the enactment of one or more of the provisions of this Act, none of the other or remaining provisions of the Act shall therefore be held to be inoperative or *ultra vires*, but the latter provisions shall stand as if they had been originally enacted as separate and independent enactments and as the only provisions of the Act; the intention of Parliament being to give independent effect to the extent of the powers to every enactment and provision in this Act contained.”

It is said that this is a plain indication of the intention of the legislature to pass any portion of the Act which might be valid in itself, in however truncated form the whole Act is left after rejecting the other portions. Moreover counsel for British Columbia urged the









IN THE MATTER of a Reference as to whether the Parliament of Canada had legislative jurisdiction to enact The Farmers' Creditors Arrangement Act, 1934, as amended by The Farmers' Creditors Arrangement Act Amendment Act, 1935.

TEXTS of The Farmers' Creditors Arrangement Act, 1934, as amended by The Farmers' Creditors Arrangement Act, 1935, and the Judgments pronounced by the Supreme Court of Canada and by the Judicial Committee of His Majesty's Privy Council.



OTTAWA  
J. O. PATENAUDE, I.S.O.  
PRINTER TO THE KING'S MOST EXCELLENT MAJESTY  
1937



IN THE MATTER of a Reference as to whether the Parliament of Canada had legislative jurisdiction to enact The Farmers' Creditors Arrangement Act, 1934, as amended by The Farmers' Creditors Arrangement Act Amendment Act, 1935.

TEXTS of The Farmers' Creditors Arrangement Act, 1934, as amended by The Farmers' Creditors Arrangement Act, 1935, and the Judgments pronounced by the Supreme Court of Canada and by the Judicial Committee of His Majesty's Privy Council.



OTTAWA  
J. O. PATENAUDE, I.S.O.  
PRINTER TO THE KING'S MOST EXCELLENT MAJESTY  
1937





IN THE MATTER of a Reference as to whether the Parliament of Canada had legislative jurisdiction to enact The Farmers' Creditors Arrangement Act, 1934, as amended by The Farmers' Creditors Arrangement Act Amendment Act, 1935.

## I N D E X

|                                                                                                                               | PAGE |
|-------------------------------------------------------------------------------------------------------------------------------|------|
| 'The Farmers' Creditors Arrangement Act, 1934, as amended by the Farmers' Creditors Arrangement Act Amendment Act, 1935 ..... | 5    |
| Judgment of the Supreme Court of Canada.....                                                                                  | 12   |
| Judgment of the Privy Council.....                                                                                            | 27   |



# STATUTES OF CANADA, 1934

## CHAPTER 53

As amended by Chapter 20 of 1935.

**W**HEREAS in view of the depressed state of agriculture the present indebtedness of many farmers is beyond their capacity to pay; and whereas it is essential in the interest of the Dominion to retain the farmers on the land as efficient producers and for such purpose it is necessary to provide means whereby compromises or rearrangements may be effected of debts of farmers who are unable to pay: Therefore His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

**1.** This Act may be cited as *The Farmers' Creditors Arrangement Act, 1934.* Short title.

### BANKRUPTCY AND INSOLVENCY PROVISIONS

- 2.** (1) In this Act unless the context otherwise requires or implies, the expression
- |                                                                                                                           |                                           |
|---------------------------------------------------------------------------------------------------------------------------|-------------------------------------------|
| (a) "assignment" means an assignment made under the <i>Bankruptcy Act</i> by a farmer;                                    | Interpretation.<br>"Assignment,"          |
| (b) "Board" means a board of review established under this Act;                                                           | "Petition,"<br>"Composition."<br>"Board." |
| (c) "court" means the court having jurisdiction under this Act;                                                           | "Court."                                  |
| (d) "creditor" includes a secured creditor;                                                                               | "Creditor."                               |
| (e) "district" means a judicial district of a province to which this Act applies;                                         | "District."                               |
| (f) "farmer" means a person whose principal occupation consists in farming or the tillage of the soil;                    | "Farmer."                                 |
| (g) "mortgage" includes a hypothec and also a deed of sale with a right of redemption;                                    | "Mortgage."                               |
| (h) "Official Receiver" means an Official Receiver appointed under this Act;                                              | "Official Receiver."                      |
| (i) "petition" means a petition in bankruptcy against a farmer;                                                           | "Petition."                               |
| (j) "proposal" means a proposal for a composition, extension of time or scheme of arrangement made by a farmer hereunder. | "Proposal."                               |

Application  
of *Bank-  
ruptcy Act*.  
R.S., c. 11.

(2) Unless it is otherwise provided or the context otherwise requires, expressions contained in this Act shall have the same meaning as in the *Bankruptcy Act*, and this Act shall be read and construed as one with the *Bankruptcy Act*, but shall have full force and effect notwithstanding anything contained in the *Bankruptcy Act*, and the provisions of the *Bankruptcy Act* and Bankruptcy Rules shall, except as in this Act otherwise provided, apply *mutatis mutandis* in the case of proceedings hereunder including meetings of creditors.

When  
proposal  
has been  
approved.

(3) In any case where the affairs of a farmer have been arranged by a proposal approved by the court or confirmed by the Board as hereinafter provided, Part I of the *Bankruptcy Act* shall notwithstanding section seven thereof thereafter apply to such farmer but only failure on the part of such farmer to carry out any of the terms of the proposal shall be deemed to be an act of bankruptcy. Provided that such failure shall not be deemed an act of bankruptcy if, in the opinion of the Court, such act was due to causes beyond the control of such farmer.

Official  
Receivers.

**3.** (1) The Governor in Council may appoint an Official Receiver or Receivers in each county or district or for any number of counties or districts of any province to which this Act applies as he may deem necessary or expedient.

In county,  
etc., where  
farmer  
resides.

(2) In the case of an assignment or petition an Official Receiver in the county or district where the farmer resides shall be the Official Receiver for the purposes of this Act and of the *Bankruptcy Act*.

Appoint-  
ment.

(3) The Governor in Council may appoint any person to be an Official Receiver under this Act including the holder of any other office, whether Dominion or provincial, and the holder of any such office shall, notwithstanding anything contained in any other statute or law, be bound to perform the functions and duties of the Official Receiver.

Duties of  
Official  
Receiver.

(4) The Official Receiver shall, in the case of an assignment or petition by a farmer, perform the functions and duties of the Official Receiver, custodian and trustee under the *Bankruptcy Act* and the meetings of creditors shall be held at his office.

Provisions  
relating to  
gazetting  
not to apply.

**4.** The provisions of the *Bankruptcy Act* relating to gazetting shall not apply in the case of an assignment or petition, and the provisions of the said Act requiring Official Receivers to keep the *Canada Gazette* on file shall not apply in the case of Official Receivers appointed under this Act.

Jurisdiction.

**5.** (1) In the case of an assignment, petition or proposal, in the province of Quebec, the Superior Court of the judicial district where the farmer resides, and in other provinces, the county or district court, shall have exclusive jurisdiction in bankruptcy subject to appeal as provided in section one hundred and seventy-four of the *Bankruptcy Act*.



(2) The Superior, county or district court judge shall exercise the powers vested in the registrar by section one hundred and fifty-nine of the *Bankruptcy Act*. Powers of judge.

(3) The prothonotary of the Superior Court and the clerk of the county or district shall perform all the duties of the registrar, except his judicial duties. Duties of clerk.

5A. No proposal under this Act nor the approval or confirmation thereof shall release any person who, under the *Bankruptcy Act*, would not be released by an Order of Discharge if the debtor had been adjudged bankrupt, nor shall the approval or confirmation of a proposal release any security given by any third person. 1935, Ch. 20, Am. Restriction as to release.

#### COMPOSITIONS.

6. (1) A farmer who is unable to meet his liabilities as they become due may make a proposal for a composition, extension of time or scheme of arrangement either before or after an assignment has been made. If farmer unable to meet his liabilities.

(2) Such proposal shall be filed with the Official Receiver who shall forthwith convene a meeting of the creditors and perform the duties and functions required by the *Bankruptcy Act* to be performed by a trustee in the case of a proposal for a composition, extension of time or scheme of arrangement. Duties of Official Receiver.

7. A proposal may provide for a compromise or an extension of time or a scheme of arrangement in relation to a debt owing to a secured creditor, or in relation to a debt owing to a person who has acquired movable or immovable property subject to a right of redemption, but in that event the concurrence of the secured creditor or such person, shall be required, except in the case of a proposal formulated and confirmed by the Board of Review as hereinafter provided. In case of a debt owing to a secured creditor.

8. Whenever a proposal relates to the rights of a secured creditor or of a person who has acquired movable or immovable property subject to a right of redemption, such creditor or person may value his security and shall be entitled to vote only in respect of the balance of his claim after deducting the amount of his valuation; provided, however, that no proposal shall be approved by the court which provides for the payment to such secured creditor or person on account of such security of any amount in excess of his valuation, or for granting to him any new security for an amount in excess of his valuation. Valuation of security of secured creditor.

9. Subsections three and five of section sixteen of the *Bankruptcy Act* shall not apply in the case of a proposal for a composition, extension of time or scheme of arrangement made by any farmer. Certain provisions of the *Bankruptcy Act* not to apply.

Farmer to  
execute  
necessary  
instruments.

**10.** Whenever a proposal has been approved by the court or whenever a proposal has been formulated and confirmed by the Board, as hereinafter provided, the court may order the farmer to execute any mortgage, conveyance or other instrument necessary to give effect to the proposal.

Stay of  
proceedings.

R.S. c. 11.

**11.** (1) On the filing with the Official Receiver of a proposal, no creditor whether secured or unsecured, shall have any remedy against the property or person of the debtor, or shall commence or continue any proceedings under the *Bankruptcy Act*, or any action, execution or other proceedings for the recovery of a debt provable in bankruptcy, or the realization of any security unless with leave of the court and on such terms as the court may impose: Provided, however, that the stay of proceedings herein provided shall not be effective for more than ninety days from the date of filing of the proposal with the Official Receiver, unless the court makes one or more orders extending the time for the purpose of any proceedings in connection with the proposal. 1935, Ch. 20, Am.

Preservation  
of property.

(2) On a proposal being filed the property of the debtor shall be deemed to be under the authority of the court pending the final disposition of any proceedings in connection with the proposal and the court may make such order as it deems necessary for the preservation of such property.

#### PROVINCIAL BOARDS OF REVIEW.

Board of  
review.

**12.** (1) The Governor in Council may, whenever he considers it expedient, establish in any province a Board of Review which shall exercise in such province the jurisdiction hereinafter provided.

Appointment  
of Com-  
missioners.

(2) A Board shall consist of a Chief Commissioner and two Commissioners who shall be appointed by the Governor in Council and shall hold office during pleasure and shall receive such remuneration as the Governor in Council may provide.

Chief  
Commis-  
sioner to be  
a judge.

(3) The Chief Commissioner shall be a judge of the court of the province invested with original or appellate jurisdiction in bankruptcy by the *Bankruptcy Act*, and one Commissioner shall be appointed as a representative of creditors and one Commissioner shall be appointed as a representative of debtors. In the event of any Commissioner other than the Chief Commissioner being unable to hear and deal with any case for any reason considered sufficient by the remaining Commissioners, then the remaining Commissioners shall name an *ad hoc* Commissioner to hear and deal with such case with all the powers of the Commissioner whose place he takes. In the event of the Chief Commissioner being unable to hear and deal with any case on the request of the other Commissioners the Minister shall name an *ad hoc* Chief Commissioner with all the powers of the Chief Commissioner. 1935, Ch. 20, Am.

(4) In any case where the Official Receiver reports that a farmer has made a proposal but that no proposal has been approved by the creditors, the Board shall, on the written request of a creditor or of the debtor, endeavour to formulate an acceptable proposal to be submitted to the creditors and the debtor, and the Board shall consider representations on the part of those interested. Proposal.

(5) If any such proposal formulated by the Board is approved by the creditors and the debtor, it shall be filed in the court, and shall be binding on the debtor and all the creditors. If proposal approved.

(6) If the creditors or the debtor decline to approve the proposal so formulated, the Board may nevertheless confirm such proposal, either as formulated or as amended by the Board, in which case it shall be filed in the Court and shall be binding upon all the creditors and the debtor as in the case of a proposal duly accepted by the creditors and approved by the Court. 1935, Ch. 20, Am. Board may confirm proposal.

(7) Every request to formulate a proposal shall be dealt with by the full Board, but a determination of the majority shall be deemed to be the determination of the Board: Provided that the Board may direct any one or more of its members on its behalf to inspect and investigate any or all circumstances of any request for review and report to the Board. 1935, Ch. 20, Am. Requests dealt with by the full board.  
Proviso.

(8) The Board shall base its proposal upon the present and prospective capability of the debtor to perform the obligations prescribed and the productive value of the farm. How Board to base its proposal.

(9) The Board may decline to formulate a proposal in any case where it does not consider that it can do so in fairness and justice to the debtor or the creditors. Board may decline to formulate a proposal.

(10) For the purposes of the performance of its duties and functions hereunder a Board shall have the powers of a Commissioner appointed under the *Inquiries Act*. Powers under *Inquiries Act*.

(11) Notwithstanding anything contained in the *Bankruptcy Act*, an insolvent debtor resident in the Province of Quebec, engaged solely in farming or the tilling of the soil, whose liabilities to creditors provable as debts under the *Bankruptcy Act* exceed five hundred dollars, may make an assignment for the general benefit of his creditors in any case where the Board declines to formulate a proposal and certifies that in its opinion the debtors' affairs can best be administered under the *Bankruptcy Act*. 1935, Ch. 20, Am. Assignments by insolvent farmers in Quebec.

**13.** The Governor in Council may also appoint a registrar and any other necessary officers to assist the Board and such officers shall hold office during pleasure and receive such remuneration as the Governor in Council may provide. Appointment and remuneration of Registrar and other officers.



Official Receiver, etc., may appear in person.

**14.** The Official Receiver, custodian or trustee may appear in person and be heard by the court or the Board in any proceedings hereunder.

#### RULES AND REGULATIONS.

Governor in Council may make rules and regulations.

**15.** (1) The Governor in Council may make rules and regulations governing the procedure in the case of an assignment, petition or proposal including the advertising to be done in each case and the procedure in relation to the exercise of jurisdiction of the Board and to give effect to the provisions of this Act, and may establish a tariff of fees to be paid in any such case including the remuneration of the trustee.

Supervision of trustees.

(2) Every trustee acting as such under this Act shall be subject to such supervision by the Superintendent of Bankruptcy as the Governor in Council may determine.

Administration and expenses.

**16.** (1) The Minister of Finance shall be charged with the administration of this Act, and the expenses necessary for such administration shall be payable out of any unappropriated moneys of the Consolidated Revenue Fund.

Annual report.

(2) The Minister shall at the end of the fiscal year prepare a report of expenditure incurred and of proceedings taken under this Act and shall lay the same before Parliament forthwith, or if Parliament be not then sitting, within fifteen days after the commencement of the next ensuing session.

#### INTEREST ON FARM LOANS.

Rate of interest.

**17.** (1) Notwithstanding the provisions of any other statute or law, whenever any rate of interest exceeding seven per centum is stipulated for in any mortgage of farm real estate, if any person liable to pay the mortgage tenders or pays to the person entitled to receive the money, the amount owing on such mortgage and interest to the time of payment, together with three months' further interest in lieu of notice, no interest shall after the expiry of three months period aforesaid be chargeable, payable or recoverable in respect of the said mortgage at any rate in excess of five per centum per annum.

Application of this section.

(2) The provisions of this section shall apply in the case of any mortgage heretofore or hereafter made and whether or not the principal sum is due and owing at the time such tender or payment is made.

Act to come into force upon proclamation.

**18.** This Act except section seventeen shall not come into force in any province until proclaimed by the Governor in Council to be in force in such province, but section seventeen shall come into force when this Act is assented to.

When Act shall not apply.

**19.** The said Act shall not, without the concurrence of the creditor, apply in the case of any debt incurred after the first day of May, 1935. 1935, Ch. 20, Am.





(1936)  
S.C.R. 384.

## JUDGMENT OF THE SUPREME COURT OF CANADA

\* Feb. 3, 4.

\* June 17.

IN THE MATTER OF A REFERENCE AS TO  
WHETHER THE PARLIAMENT OF CANADA  
HAD LEGISLATIVE JURISDICTION TO EN-  
ACT THE FARMERS' CREDITORS ARRANGE-  
MENT ACT, 1934, 24-25 GEO. V, C. 53, AS  
AMENDED BY THE FARMERS' CREDITORS  
ARRANGEMENT ACT AMENDMENT ACT, 1935,  
25-26 GEO. V, C. 20.

*Constitutional law—The Farmers' Creditors Arrangement Act—Constitutional validity—Bankruptcy and insolvency—B.N.A. Act, 1867, s. 91, ss. 21.*

*The Farmers' Creditors Arrangement Act*, which is entitled "An Act to Facilitate Compromises and Arrangements between Farmers and their Creditors," provides by its enactments a procedure whereby a farmer may make a proposal for a composition, extension of time or a scheme of arrangement, to his creditors. If the proposal is accepted by the ordinary creditors and the secured creditors whose rights are affected concur, it is submitted to the Court for approval. If it is not accepted by the ordinary creditors or if a secured creditor whose rights are affected by it does not concur, the matter is referred to a Board of Review to formulate a proposal. If the proposal is accepted by the creditors and approved by the Court, or if it is formulated by the Board of Review and is approved by the creditors and the debtor, or if, though not so approved, it is confirmed by the Board of Review, it shall be binding upon all the creditors and the debtor.

*Held*, Cannon J. dissenting, that the Act is *intra vires* of the Parliament of Canada. The power of the Parliament to enact this statute is derived from subdivision 21 of section 91 of the B.N.A. Act, in virtue of which the exclusive legislative authority of the Parliament of Canada extends to the subject of Bankruptcy and Insolvency. The provisions of the statute affect farmers who are in such a situation that they are unable to pay their debts as they fall due; and it is competent to Parliament, possessing plenary authority in respect of bankruptcy and insolvency, to treat this condition of affairs as a state of insolvency.

*Per* Cannon J. dissenting.—In view of the accepted aims and past history of the bankruptcy and insolvency legislation, the Parliament of Canada, in enacting the Act, has exceeded the domain of bankruptcy and insolvency to which its jurisdiction is limited. More particularly, the Act does not provide, as in the case of an insolvent person, for the rateable distribution of the assets of the debtor among his creditors nor for the discharge of the debt. Section 17 of the Act, which fixes the rate of interest, is *intra vires* of the Parliament of Canada under ss. 19 of section 91 of the B.N.A. Act.

REFERENCE by His Excellency the Governor General in Council to the Supreme Court of Canada, in the exercise of the powers conferred by s. 55 of the *Supreme Court*

\* PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket, Davis and Kerwin JJ.

Act (R.S.C. 1927, c. 35) of the following question: Is the *Farmers' Creditors Arrangement Act*, 1934, as amended by the *Farmers' Creditors Arrangement Act Amendment Act*, 1935, or any of the provisions thereof, and in what particular or particulars or to what extent, *ultra vires* of the Parliament of Canada?

The Order in Council referring the question to the Court reads as follows:

The Committee of the Privy Council have had before them a report, dated 13th November, 1935, from the Minister of Justice, referring to *The Farmers' Creditors Arrangement Act*, 1934, chapter 53 of the statutes of Canada, 1934, being an Act to Facilitate Compromises and Arrangements between Farmers and their Creditors, and to its amending Act, *The Farmers' Creditors Arrangement Act Amendment Act*, 1935, chapter 20 of the statutes of Canada, 1935, the principal of which Acts was enacted as appears from the preamble thereof upon the recital that in view of the depressed state of agriculture the present indebtedness of many farmers was beyond their capacity to pay; that it was essential in the interest of the Dominion to retain the farmers on the land as efficient producers and for such purpose it was necessary to provide means whereby compromises or rearrangements might be effected of debts of farmers who were unable to pay.

The Minister states that doubts exist or are entertained as to whether the Parliament of Canada had jurisdiction to enact the said Acts; or either of them, in whole or in part, and that it is expedient that such question should be referred to the Supreme Court of Canada for judicial determination.

The Committee, accordingly, on the recommendation of the Minister of Justice, advise that the following question be referred to the Supreme Court of Canada for hearing and consideration, pursuant to Section 55 of the Supreme Court Act:—

Is the *Farmers' Creditors Arrangement Act*, 1934, as amended by the *Farmers' Creditors Arrangement Act Amendment Act*, 1935, or any of the provisions thereof, and in what particular or particulars or to what extent, *ultra vires* of the Parliament of Canada?

E. J. LEMAIRE,  
Clerk of the Privy Council.

1936  
REFERENCE  
re  
FARMERS'  
CREDITORS  
ARRANGE-  
MENT  
ACT, 1934,  
AND ITS  
AMENDING  
ACT, 1935.

1936  
 {  
 REFERENCE  
*re*  
 FARMERS'  
 CREDITORS'  
 ARRANGE-  
 MENT  
 ACT, 1934,  
 AND ITS  
 AMENDING  
 ACT, 1935.

The counsel mentioned in the report of the judgments on the Reference *re* Section 498A of the Criminal Code (p. 365) appeared on this Reference, except that *Aimé Geoffrion K.C.* for Quebec and *G. McG. Sloan K.C.* (Attorney-General) and *J. W. deB Farris K.C.* for British Columbia were not present; and *J. L. Ralston K.C.* appeared for the Attorney-General for Quebec and British Columbia.

The judgment of Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ. was delivered by

DUFF C.J.—The title of the Act, which is really an office consolidation of a statute of 1934 with another of 1935, is “An Act to facilitate compromises and arrangements between farmers and their creditors.”

The Act provides a procedure whereby a farmer may make a proposal for a composition, extension of time or scheme of arrangement to his creditors. If the proposal is accepted by the ordinary creditors, and secured creditors whose rights are affected agree to it, it is submitted to the Court of approval. If it is not accepted by the ordinary creditors, or if a secured creditor whose rights are affected does not agree, there is a reference to a board of review to formulate a proposal. If a proposal is formulated by the board of review and approved by the creditors and the debtor; or if, though not so approved, it is confirmed by the board of review, it is binding on all the creditors and the debtor.

“Farmer” means “a person whose principal occupation consists in farming or the tillage of the soil.” “Creditor” includes “secured creditor.”

Subsection 2 of section 2 makes the provisions of the *Bankruptcy Act* and rules applicable and is in these words:

Unless it is otherwise provided or the context otherwise requires, expressions contained in this Act shall have the same meaning as in the *Bankruptcy Act*, and this Act shall be read and construed as one with the *Bankruptcy Act*, but shall have full force and effect notwithstanding anything contained in the *Bankruptcy Act*, and the provisions of the *Bankruptcy Act* and *Bankruptcy Rules* shall, except as in this Act otherwise provided, apply *mutatis mutandis* in the case of proceedings hereunder including meetings of creditors.

We are chiefly concerned with the provisions with regard to compositions. It is provided that a farmer who is unable to meet his liabilities as they become due may make a proposal for a composition, an extension of time or scheme of arrangement, and file a proposal with the Official Receiver who shall forthwith call a meeting of the creditors.



The Official Receiver is to perform the duties and functions required by the *Bankruptcy Act* to be performed by a trustee in the case of a proposal for a composition, extension of time or scheme of arrangement. These duties and functions are, generally, the submission to the meeting of the proposal, and, on its acceptance by the creditors, the application to the Court to approve it. A proposal may be one in relation to a debt owing to a secured creditor or owing to a person who has acquired property subject to a right of redemption, but except in the case of a proposal confirmed by the Board of Review, the concurrence of such creditor is required. Such a creditor, if the proposal relates to the debt owing to him, may value his security, and is entitled to vote only in respect of the balance of his claim after deducting the amount of his valuation, but no proposal is to be approved by the Court which provides for payment in excess of the valuation.

The provision of the *Bankruptcy Act* preventing the approval of a proposal which does not provide for a payment of not less than fifty cents on the dollar, and priority of payment of certain debts are made inapplicable. Power is given to the Court to order a farmer to execute instruments necessary to give effect to the proposal when it has received the approval of the Court or the confirmation of the Board of Review. On the filing of a proposal, the property of the debtor is deemed to be under the authority of the Court, and creditors' remedies may not be exercised without leave of the Court for ninety days, or such further time as the Court may order.

Provision is made for the establishment in any province of a Board of Review consisting of a Chief Commissioner, who must be a Judge having jurisdiction in bankruptcy, and two Commissioners, one as representative of creditors and one as representative of debtors. When the Official Receiver reports that no proposal has been approved by the creditors, although one has been made, the Board, on the written request of a creditor or the debtor, is required to endeavour to formulate an acceptable proposal, and to consider representations by the parties interested. If any such proposal is approved by the creditors and the debtor, it is binding on them. If such a proposal is not approved, the

1936  
REFERENCE  
re  
FARMERS'  
CREDITORS  
ARRANGE-  
MENT  
ACT, 1934,  
AND ITS  
AMENDING  
ACT, 1935.  
DUFF C.J.

1936  
REFERENCE  
*re*  
FARMERS'  
CREDITORS  
ARRANGE-  
MENT  
ACT, 1934,  
AND ITS  
AMENDING  
ACT, 1935.  
DUFF C.J.

Board may confirm it and it becomes binding upon all the creditors and the debtor. The full Board must deal with every request to formulate a proposal, and the determination of the majority prevails. The Board must base its proposal upon the present and prospective capability of the debtor to perform the obligations prescribed and the productive value of the farm, and may decline to formulate a proposal where it does not consider it can do so in fairness and justice to the debtor and the creditors. The Board is invested with the powers of a Commissioner appointed under the *Inquiries Act*. Special provision is made for insolvent farmer debtors residing in Quebec, whereby they may make an assignment for the general benefit of their creditors.

Section 17 provides that whenever any rate of interest exceeding seven per cent is stipulated for in any mortgage of farm real estate, after tender or payment of the amount owing, together with three months' further interest, no interest, after the expiry of the three months, shall be chargeable at any rate in excess of five per cent per annum.

As above mentioned, the provisions of the statute are made a part of the general system for the administration of the assets of bankrupts and insolvents established by the *Bankruptcy Act*; and they come into operation only where a farmer who is unable to meet his liabilities as they become due makes a proposal for a composition, extension of time or scheme of arrangement.

The grounds upon which the validity of the statute is impeached are, mainly, two: First, it is argued that it is not competent to the Parliament of Canada, in exercising its powers in relation to bankruptcy and insolvency, to enact legislation depriving a secured creditor of his right to realize his security fully for the recovery of the debt owing to him, where such security consists of a conventional charge upon the property of the insolvent or affecting that right by subjecting him in respect of it to the discretionary order of a tribunal.

Second, it is contended that the Parliament of Canada is incompetent to legislate in such a way as to affect the rights of the government of a province as creditor of an insolvent in the manner in which this statute professes to do.

The general scope of the jurisdiction in relation to bankruptcy or insolvency conferred under section 91 is thus described by Lord Selburne in *L'Union St. Jacques v. Bélisle* (1):—

The words describe in their own legal sense provisions made by law for the administration of the estates of persons who may become bankrupt or insolvent, according to rules and definitions prescribed by law, including of course the conditions in which that law is to be brought into operation, the manner in which it is to be brought into operation and the effect of its operation.

These words would indicate that Parliament, in providing for the administration of the estates of bankrupts and insolvents, has a very wide discretion and is not necessarily limited in the exercise of that discretion by reference to the particular provisions of bankruptcy legislation in England prior to the date of the B.N.A. Act. It is not necessary, however, for the purpose of passing upon the validity of this statute to determine to what extent Parliament is empowered, when making provision for the administration of such estates, to depart from the broad lines of such legislation as known and understood in 1867.

It is not open to dispute in this Court that legislation in respect of "compositions and arrangements is a natural and ordinary component of a system of bankruptcy and insolvency law" (*In re Companies' Creditors Arrangement Act* (2)). Nor can the authority of Parliament be controverted to enact provisions by which the security of a creditor of an insolvent may be prejudicially affected without his consent. That was decided in the case just referred to. By the statute under consideration on that reference, it is enacted (section 4) that

Where a compromise or arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of such creditors, or class of creditors, and, if the court so determines, of the shareholders of such company, to be summoned in such manner as the court directs.

By section 5 it is provided that,

If a majority in number representing three-fourths in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections three and four of this Act, or either of such sections, agree to any compromise or arrangement either as proposed . . . or modified at such meeting or meetings, the compromise

1936  
REFERENCE  
re  
FARMERS'  
CREDITORS  
ARRANGE-  
MENT  
ACT, 1934,  
AND ITS  
AMENDING  
ACT, 1935.  
—  
DUFF C.J.  
—



1936  
 REFERENCE  
 re  
 FARMERS'  
 CREDITORS'  
 ARRANGE-  
 MENT  
 ACT, 1934,  
 AND ITS  
 AMENDING  
 ACT, 1935.  
 DUFF C.J.

or arrangement may be sanctioned by the court, and if so sanctioned shall be binding on all the creditors, or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and shall also be binding on the company. . . .

"Secured creditors" include the "holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company. . . ."

In the case mentioned, this statute was held to be *intra vires*. The decision necessarily involves the proposition that Parliament may legislate in such a way as to make the terms of a compromise, to which a majority of three-fourths in value of secured creditors, or any class of secured creditors, in the sense mentioned, are parties, where the composition has received judicial sanction, binding upon a secured creditor who is not a party to the composition and has not given his assent to it. The principle of the legislation, in a word, is that a secured creditor under the conditions mentioned may be required by law to accept a composition to which he has not given his assent.

It has, of course, been a familiar characteristic of the operation of bankruptcy and insolvency legislation that a creditor possessing security on the property of his debtor in virtue of a judgment or of an execution should lose his privileged position to the extent to which the judgment or execution remains unsatisfied on bankruptcy supervening. But the argument under consideration distinguishes between the kind of security given by law to a judgment creditor and a conventional security and, in particular, a security in the nature of mortgage. From the point of view of the judgment creditor, the distinction, perhaps, does not rest upon very satisfactory grounds. It was at one time the law in some of the provinces of Canada that a judgment registered in a land registry office constituted a charge upon the lands of the judgment debtor enforceable in the same manner as an equitable charge for securing the payment of money; and a confession of judgment at one time was a form of security well known. Such security, although it derived its effectiveness from the privileges conferred by the law upon judgment creditors, had its origin in convention. Moreover, the judgment creditor who, by the law of the province, is the holder of a hypothec upon the lands of the judgment debtor or by virtue of the registration of his judgment, has what



amounts to an equitable charge upon such lands may suffer as great a deprivation by bankruptcy legislation which takes away his privilege upon a supervening bankruptcy as would a mortgagee affected in the same way. Nevertheless, it is true that, traditionally, mortgages have not, by bankruptcy legislation, been prejudicially affected in their right to resort to their securities.

Mr. Rowell has called our attention to section IX of chapter 19 (21 Jac. 1), and it appears that from the date of that enactment (1623) down to 1869, English bankruptcy legislation has contained a substantially similar provision. The section is in these words:—

IX. And, for the better division and distribution of the lands, tenements, hereditaments, goods, chattels and other estate of such bankrupt, to and amongst his or her creditors; Be it enacted, That . . . ; and that all and every creditor and creditors having security for his or their several debts, by judgment, statute, recognizance, specialty with penalty or without penalty, or other security, or having no security, or having made attachments in London, or any other place, by virtue of any custom there used, of the goods and chattels of any such bankrupt, whereof there is no execution or extent served and executed upon any of the lands, tenements, hereditaments, goods, chattels, and other estate of such bankrupts, before such time as he or she shall or do become bankrupt, shall not be relieved upon any such judgment, statute, recognizance, specialty, attachments, or other security for any more than a rateable part of their just and due debts, with the other creditors of the said bankrupt, without respect to any such penalty or greater sum contained in any such judgment, statute, recognizance, specialty with penalty, attachment or other security.

By force of another section of the same statute, mortgagees of real or personal property are not within the general words “other security.” The section in itself, however, is of significance. Among the securities mentioned are “statutes and recognizances.”

Statutes merchant and statutes staple are discussed by Blackstone (Ed. 1766, Clarendon Press, Vol. II, ch. 10, s. 4, p. 160). This section is devoted to one species of estates defeasible on condition and is preceded, in section 3, by a discussion of estates held *in vadio*, or pledge, which are said to be of two kinds—*vivum vadium*, or living pledge, and *mortuum vadium*, or dead pledge or mortgage. These sections (3 and 4) are introduced thus:

There are some estates defeasible upon condition subsequent, that require a more peculiar notice. Such are

Section 4 is in these words:

A fourth species of estates, defeasible on condition subsequent, are those held by *statute merchant*, and *statute staple*; which are very nearly

1936  
REFERENCE  
re  
FARMERS'  
CREDITORS  
ARRANGE-  
MENT  
ACT, 1934,  
AND ITS  
AMENDING  
ACT, 1935.  
—  
DUFF C.J.  
—

1936  
 REFERENCE  
 re  
 FARMERS'  
 CREDITORS'  
 ARRANGE-  
 MENT  
 ACT, 1934,  
 AND ITS  
 AMENDING  
 ACT, 1935.  
 DUFF C.J.

related to the *vivum vadium* before mentioned, or estate held till the profits thereof shall discharge a debt liquidated or ascertained. For both the statute merchant and statute staple are securities for money; the one entered into pursuant to the statute 13 Edward 1 *de marcatoribus*, and thence called a statute merchant; the other pursuant to the statute 27 Edw. III, c. 9, before the mayor of the staple, that is to say, the grand mart for the principal commodities or manufactures of the kingdom formerly held by act of parliament in certain trading towns, and thence this security is called a statute staple. They are both, I say, securities for debts, originally permitted only among traders, for the benefit of commerce; whereby the lands of the debtor are conveyed to the creditor, till out of the rents and profits of them his debt may be satisfied; and during such time as the creditor so holds the lands, he is tenant by statute merchant or statute staple. There is also a similar security, the recognizance in the nature of a statute staple, which extends the benefit of this mercantile transaction to all the king's subjects in general, by virtue of the statute 23 Hen. VIII, c. 6.

The statutes which introduced these forms of securities were repealed in 1863. These securities, it should be observed, were effected by recognizance, the debtor's lands being bound as from the date of the recognizance. Blackstone, however, treats the security as one arising from conveyance, and Blackstone may be safely accepted as giving the current professional view of such transactions. The effect of the section quoted was that the holders of such securities were put in the same position as a judgment creditor; and upon bankruptcy a creditor holding such a security ranked on the assets rateably with unsecured creditors.

Even if it were open to us to depart from our recent decision in the reference concerning the *Companies' Creditors Arrangement Act* (1), we should, treating the matter as *res integra*, have thought that the history of bankruptcy legislation down to the year 1867 would not justify a conclusion that provisions such as those in the *Companies' Creditors Arrangement Act*, or those in the statute before us dealing with secured creditors were provisions beyond the discretion of Parliament to incorporate in a system for the administration of the estates of insolvents.

Before turning to the second ground upon which the legislation is attacked, it is convenient to refer to the nature of the proposal which is authorized in the case of secured creditors. That appears from section 7 which is in these words:

7. A proposal may provide for a compromise or an extension of time or a scheme of arrangement in relation to a debt owing to a secured

creditor, or in relation to a debt owing to a person who has acquired movable or immovable property subject to a right of redemption, but in that event the concurrence of the secured creditor or such person, shall be required, except in the case of a proposal formulated and confirmed by the Board of Review as hereinafter provided.

It will be observed that the character of proposal contemplated in such cases is strictly limited to one which provides for a compromise, an extension of time or scheme of arrangement in relation to a debt owing to the secured creditor. The statute apparently, as counsel for the Dominion argued, does not envisage any interference with the rights of secured creditors except in relation to the debts owing to them and then (in the absence of the assent of the creditor) only to a compromise or extension of time or scheme of arrangement embodied in the proposal formulated and confirmed by the Board of Review.

As to the second ground of objection, the judgment of the Judicial Committee in *Re Silver Brothers* (1) seems very clearly to lay down and decide that it is competent to the Dominion, in legislating in relation to bankruptcy or insolvency, to deal with the privilege attaching to debts owing to the Crown in the right of a province and to take away any priority accorded to such debts by the law of a province. The legislative authority in bankruptcy matters to deal with debts owing to a province is no less than the authority to deal with debts owing to the Dominion.

To summarize: The power to enact this statute is derived from subdivision 21 of section 91 of the B.N.A. Act—in virtue of which the exclusive legislative authority of the Parliament of Canada extends to the subject of Bankruptcy and Insolvency. The broad purpose of the statute is, in the words of the title, “to facilitate compromises and arrangements between farmers and their creditors.” The provisions of the statute affect farmers who are in such a situation that they are unable to pay their debts as they fall due. It is competent to Parliament, possessing plenary authority in respect of bankruptcy and insolvency, to treat this condition of affairs as a state of insolvency. The provisions of the statute only came into operation where such a state of insolvency exists. *Prima facie*, therefore, it is, within the ordinary meaning of the words, a statute dealing with insolvency. The statute is, by its express terms, incor-

1936

REFERENCE  
reFARMERS'  
CREDITORS  
ARRANGE-  
MENT  
ACT, 1934,  
AND ITS  
AMENDING  
ACT, 1935.

DUFF C.J.

(1) [1932] A.C. 514, at 519-521.



1936  
 REFERENCE  
*re*  
 FARMERS'  
 CREDITORS  
 ARRANGE-  
 MENT  
 ACT, 1934,  
 AND ITS  
 AMENDING  
 ACT, 1935.  
 ———  
 DUFF C. J.

porated into the general system of bankruptcy legislation in force in Canada and it is not open to dispute that legislation in respect of "compositions and arrangements is a natural and ordinary component of a system of bankruptcy and insolvency law" (see page 5 of the judgment).

It is contended on behalf of the provinces that the jurisdiction of the Dominion in relation to this subject is limited to the enactment of legislation which at least in its broad lines, conforms to the systems of bankruptcy and insolvency legislation which had prevailed in Great Britain or in Canada down to the time of the passing of the B.N.A. Act. We do not consider it necessary to decide upon the question whether or not the powers vested in Parliament in relation to this subject are for all time restricted by reference to the legislative practice which obtained prior to the passing of the B.N.A. Act. The attack upon the statute was mainly directed against the provision which makes it possible to force the terms of a composition upon a secured creditor by which a secured creditor may be compelled to submit to a reduction of the debt owing to him by the insolvent.

This is not a new feature of insolvency legislation although, down to the enactment of the *Companies' Creditors Arrangement Act* in 1933, mortgagees had never been by legislation placed in such a position. The statute now under consideration does not in this respect differ from the *Companies' Creditors Arrangement Act* and the principle of our decision on the Reference respecting that statute (1) is applicable; that this, although a departure from previous practice in bankruptcy or insolvency legislation, was not beyond the discretionary authority bestowed upon Parliament under head no. 21 of section 91.

The statute being *intra vires*, the interrogatory addressed to us should be answered in the negative.

CANNON J.—This Court, on a previous reference reached the conclusion that the *Companies' Creditors Arrangement Act* (1), 23-24 Geo. V, ch. 36, was *intra vires* of the Parliament of Canada because the matters dealt with came within the domain of "bankruptcy and insolvency" within the intent of sec. 91, par. 21, of the B.N.A. Act.

(1) [1934] S.C.R. 659.



The Chief Justice said at p. 662:—

It seems difficult, therefore, to suppose that the purpose of the legislation is to give sanction to arrangements in the exclusive interest of a single creditor or of a single class of creditors and having no relation to the benefit of creditors as a whole. The ultimate purpose would appear to be to enable the court to sanction a compromise which, although binding upon a class of creditors only, would be beneficial to the general body of creditors as well as to the shareholders.

In my judgment, with the concurrence of Lamont, J., I found that arrangements, as provided for by the *Companies' Creditors Arrangement Act*, are, and have been, before and since Confederation component part of any system "devised to protect the creditors and at the same time help the honest debtor to rehabilitate himself and obtain a discharge."

In the dissenting judgment of Mr. Justice Badgley, whose conclusions were subsequently upheld by the Privy Council, *re L'Union St. Jacques & Bélisle* (1), I find the following at pp. 455 & 456:—

A statutory bankrupt and insolvent legislation had been in force in the two Canadas since the first *Insolvent Act* of 1864, which was continued with amendments to the time of the making of the Dominion Law of Insolvency in 1869, which repealed the provincial enactments and substituted a general Dominion Law upon the subject. By the Provincial Act of 1864, the first section specially enacts that "*the Act should apply in Lower Canada to traders only*" "AND IN Upper Canada to all persons whether traders or not," and this provision was not interfered with in the subsequent statutory amendments of that Provincial Act.

By the Dominion "Act respecting Insolvency" of 1869, the Lower Canada statutory restriction is extended throughout the Dominion of the four provinces, and it is enacted by the first section of the Dominion Act of 1869. "This Act shall apply to traders only." Now it is nothing but just to read the general subject of bankruptcy and insolvency by the light of the Dominion legislation itself, as indicating the intent of that legislature as to the enumerated subjects for its action, and it becomes undeniable therefore, that the Society, the appellant here, comes within the express limitation and restriction of the general law, and being neither in character nor purpose commercial nor a trader, and solely and simply what it has always been, a charitable and eleemosynary institution in and for the province of Quebec, the provincial enactment for its relief can, under no circumstances be brought within the operation of the laws of Bankruptcy and Insolvency attributed to the Dominion legislature.

It must also be borne in mind that a farmer, before and since Confederation, as far as the province of Quebec was concerned, even when insolvent, was not subject to bankruptcy proceedings; he could not be compelled to assign in the other provinces, where he could voluntarily make

1936

REFERENCE  
reFARMERS'  
CREDITORS  
ARRANGE-  
MENT  
ACT, 1934,  
AND ITS  
AMENDING  
ACT, 1935.

DUFF C.J.

1936  
 REFERENCE  
<sup>re</sup>  
 FARMERS'  
 CREDITORS'  
 ARRANGE-  
 MENT  
 ACT, 1934,  
 AND ITS  
 AMENDING  
 ACT, 1935.  
 ———  
 CANNON J.  
 ———

an assignment for the distribution of his assets among his creditors, but could not be forced into insolvency. This latter provision was first made applicable to Quebec in 1919, but a special provision was subsequently passed to withdraw it from its operation. (1919, ch. 36, sec. 9; 1923, ch. 31, sec. 11; 1932, ch. 39, sec. 6.)

It may be reasonably said, as a matter of history, that nobody contemplated for a long period after Confederation that "bankruptcy or insolvency" proceedings and their essentially compulsory features could or would apply to farmers.

But the paramount consideration is that the Act which we are considering lacks the essential elements of bankruptcy legislation, to wit: the distribution of the debtor's assets rateably among his creditors, in the case of an insolvent person, whether he is willing that his assets be so distributed or not. Although provision may be made for a voluntary assignment as an alternative, it is only as an alternative. See: *Voluntary Assignment* case, *Attorney-General of Ontario v. Attorney-General of Canada* (1).

The Act does not provide for the rateable distribution of the assets of the debtor nor for the discharge of the debt. On the contrary, the only aim of the Act is to keep the farmer on his land at the expense of his creditors; the proposal for arrangement must come from him and covers only a composition, extension of time or scheme of arrangement either before or after an assignment has been made.

Another difference with the *Companies' Creditors Arrangement Act* is found in an entirely new feature which gives the Board of Review, under clause 12, paragraphs 6, 7, 8 and 9, extraordinary powers:—

(6) If the creditors or the debtor decline to approve the proposal so formulated, the Board may nevertheless confirm such proposal, either as formulated or as amended by the Board, in which case it shall be approved by the Court and shall be binding upon all the creditors and the debtor as in the case of a proposal duly accepted by the creditors and approved by the court.

(7) Every request to formulate a proposal shall be dealt with by the full Board, but a determination of the majority shall be deemed to be the determination of the Board.

(8) The Board shall base its proposal upon the present and prospective capability of the debtor to perform the obligations prescribed and the productive value of the farm.

(9) The Board may decline to formulate a proposal in any case where it does not consider that it can do so in fairness and justice to the debtor or the creditors.

These evidently are not provisions similar to what we considered proper proceedings in insolvency in the *Companies' Creditors Arrangement Act*, because they lack the essential element of a compromise: the mutual agreement of the debtor and of at least a fixed majority of the creditors.

Under subsection 6, the Board may impose an entirely new contract to the parties, confiscate, if they deem it advisable, in whole or in part, the principal due to the creditors and consider only under subsection 12, sec. (8), the present and prospective capability of the debtor to perform the obligation prescribed by the Board and the productive value of the farm, which is not to be considered as an asset to be distributed among the creditors but as an intangible and unseizable asset reserved for the enjoyment and protection of the debtor.

In the judgment of Lord Selborne in *L'Union St. Jacques v. Bélisle* (1), we find, at page 38:—

The fact that this particular society appears to have been in a state of embarrassment, and in such a financial condition that unless relieved by legislation, it might have been likely to come to ruin, does not prove that it was in any legal sense within the category of insolvency. And in point of fact the whole tendency of the Act is to keep it out of that category, and not to bring it into it. The Act does not terminate the company; it does not propose a final distribution of its assets on the footing of insolvency or bankruptcy; it does not wind it up. On the contrary, it contemplates its going on, and possibly at some future time recovering its prosperity and then these creditors, who seem on the face of the Act to be somewhat summarily interfered with, are to be reinstated.

Their Lordships were clearly of opinion that this was not a case for insolvency legislation, but a local and private matter within the provincial jurisdiction.

Applying this test, I would say that the *Farmers' Creditors Arrangement Act* is one which might be within the competence of the provincial legislature, for the same reasons, applicable in each province to each individual farmer who finds himself in difficulties, which then applied

1936  
REFERENCE  
72  
FARMERS'  
CREDITORS  
ARRANGE-  
MENT  
ACT, 1934,  
AND ITS  
AMENDING  
ACT, 1935.  
CANNON J.

1936  
 REFERENCE  
*re*  
 FARMERS'  
 CREDITORS'  
 ARRANGE-  
 MENT  
 ACT, 1934,  
 AND ITS  
 AMENDING  
 ACT, 1935.

CANNON J.

to L'Union St. Jacques, in order to enable him to carry on and, possibly at some future time, to recover his prosperity. But I cannot in view of the accepted aims and past history of the bankruptcy and insolvency legislation, reach the conclusion that Parliament, in passing this legislation, did not exceed the domain of bankruptcy and insolvency, to which its jurisdiction is limited. It has set up a charitable or eleemosynary institution, to be established in each separate province by proclamation; such local charities are to be established, maintained and managed under provincial legislation by virtue of 92 (7). The legislation has nothing to do directly with agriculture, with the science, the art or the process of supplying human wants by raising the products of the soil.

I answer the question in the affirmative, for the whole Act excepting clause 17 which fixes the rate of interest, under certain conditions which do not clearly exceed the powers of Parliament under 91 (19).



JUDGMENT OF THE LORDS OF THE JUDICIAL  
COMMITTEE OF THE PRIVY COUNCIL,  
DELIVERED THE 28th JANUARY, 1937

IN THE MATTER of a Reference as to whether the Parliament of  
Canada had legislative jurisdiction to enact the Farmers' Creditors  
Arrangement Act, 1934, as amended by the Farmers' Creditors  
Arrangement Act Amendment Act, 1935.

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA,  
*Appellant,*

v.

THE ATTORNEY-GENERAL OF CANADA AND OTHERS,  
*Respondents.*

Present at the Hearing:

Lord Atkin.

Lord Thankerton.

Lord Macmillan.

Lord Wright (Master of the Rolls).

Sir Sidney Rowlatt.

(Delivered by Lord Thankerton.)

This appeal by special leave challenges the constitutional validity  
of the Farmers' Creditors Arrangement Act, 1934, which was enacted  
by the Dominion Parliament as chapter 53 of the Statutes of Canada,  
1934.

The following question was referred to the Supreme Court of  
Canada by the Governor General in Council on the 18th November,  
1935, namely:—

“Is the Farmers' Creditors Arrangement Act, 1934, as  
amended by the Farmers' Creditors Arrangement Act Amend-  
ment Act, 1935, or any of the provisions thereof, and in what  
particular or particulars or to what extent, *ultra vires* of the  
Parliament of Canada?”

Before the Supreme Court, the argument was presented by Counsel  
on behalf of the Attorney-General of Canada and on behalf of the  
Attorneys-General of Ontario, Quebec, New Brunswick, British  
Columbia, Manitoba and Saskatchewan. On the 17th June, 1936,  
the judgment of the Supreme Court was delivered, and in the formal  
order the opinion of the Court is expressed as follows:—

“The Chief Justice, Mr. Justice Rinfret, Mr. Justice Crocket, Mr. Justice Davis and Mr. Justice Kerwin are of the opinion that the statute is *intra vires*; Mr. Justice Cannon is of the opinion that the statute, except section 17, is *ultra vires* and that section 17 is *intra vires*.”

The Attorney-General of British Columbia now appeals against that judgment, and is supported by the respondent the Attorney-General of Ontario; the Attorney-General of Canada defends the judgment.

The appellant raises no question as to section 17 of the Act, which relates to interest and falls under head 19 of section 91 of the British North America Act of 1867, but he maintains that the rest of the Act, does not truly form legislation relating to “bankruptcy and insolvency,” but is an invasion of the sphere of the Provincial Legislatures in relation to “property and civil rights in the province” or “matters of a merely local or private nature in the province,” which is secured to them by heads 13 and 16 of the British North America Act.

The appellant submitted that the fundamental characteristic of legislation in relation to bankruptcy and insolvency is that it is conceived in the interests of the creditors as a class, and provides for distribution of the debtor's assets among them, and he maintained that the Act here in question is not only lacking in such a characteristic, but is inconsistent therewith, and he gave 12 reasons, which may be compendiously stated as follows: The Act is mainly designed to keep the debtor farmer on the land at the expense of his creditors; it deals with a stage prior to bankruptcy and insolvency and is designed to prevent bankruptcy by means of a composition which is compulsory on creditors and defeats their interests; it deals with assets belonging to creditors for the benefit of the debtor; the references to bankruptcy are merely ancillary to the main design; and the Act has no general relation to bankruptcy and insolvency, as it refers to farmers only and may refer to certain provinces only.

The long title of the Act of 1934 is “An Act to facilitate compromises and arrangements between farmers and their creditors.” The relevant sections of the Act of 1934, as amended by the Act of 1935, may now be referred to. The provisions and rules of the Bankruptcy Act are made applicable by subsections 2 and 3 of section 2 of the Act, which provide,

(2) Unless it is otherwise provided or the context otherwise requires, expressions contained in this Act shall have the same meaning as in the Bankruptcy Act, and this Act shall be read and construed as one with the Bankruptcy Act, but shall have full force and effect notwithstanding anything contained in the

Bankruptcy Act, and the provisions of the Bankruptcy Act and Bankruptcy Rules shall, except as in this Act otherwise provided, apply *mutatis mutandis* in the case of proceedings hereunder including meetings of creditors.

(3) In any case where the affairs of a farmer have been arranged by a proposal approved by the Court or confirmed by the Board, as hereinafter provided, Part I of the Bankruptcy Act shall notwithstanding section seven thereof thereafter apply to such farmer but only failure on the part of such farmer to carry out any of the terms of the proposal shall be deemed to be an act of bankruptcy. Provided that such failure shall not be deemed an act of bankruptcy if, in the opinion of the Court, such act was due to causes beyond the control of such farmer.

The main provisions of the Act, on which the controversy turns, are contained in sections 6 to 11, which relate to compositions, and section 12, under which a Board of Review may be established; these sections provide as follows:—

#### COMPOSITIONS

6. (1) A farmer who is unable to meet his liabilities as they become due may make a proposal for a composition, extension of time or scheme of arrangement either before or after an assignment has been made.
- (2) Such proposal shall be filed with the Official Receiver who shall forthwith convene a meeting of the creditors and perform the duties and functions required by the Bankruptcy Act to be performed by a trustee in the case of a proposal for a composition, extension of time or scheme of arrangement.
7. A proposal may provide for a compromise or an extension of time or a scheme of arrangement in relation to a debt owing to a secured creditor, or in relation to a debt owing to a person who has acquired movable or immovable property subject to a right of redemption, but in that event the concurrence of the secured creditor or such person, shall be required, except in the case of a proposal formulated and confirmed by the Board of Review as hereinafter provided.
8. Whenever a proposal relates to the rights of a secured creditor or of a person who has acquired movable or immovable property subject to a right of redemption, such creditor or person may value his security and shall be entitled to



vote only in respect of the balance of his claim after deducting the amount of his valuation; provided, however, that no proposal shall be approved by the court which provides for the payment to such secured creditor or person on account of such security of any amount in excess of his valuation, or for granting to him any new security for an amount in excess of his valuation.

9. Subsections three and five of section sixteen of the Bankruptcy Act shall not apply in the case of a proposal for a composition, extension of time or scheme of arrangement made by any farmer.
10. Whenever a proposal has been approved by the court or whenever a proposal has been formulated and confirmed by the Board, as hereinafter provided, the court may order the farmer to execute any mortgage, conveyance or other instrument necessary to give effect to the proposal.
11. (1) On the filing with the Official Receiver of a proposal, no creditor whether secured or unsecured, shall have any remedy against the property or person of the debtor, or shall commence or continue any proceedings under the Bankruptcy Act, or any action, execution or other proceedings for the recovery of a debt provable in bankruptcy, or the realization of any security unless with leave of the court and on such terms as the court may impose; Provided, however, that the stay of proceedings herein provided shall not be effective for more than ninety days from the date of filing of the proposal with the Official Receiver, unless the court makes one or more orders extending the time for the purpose of any proceedings in connection with the proposal. 1935, Ch. 20, Am.
  - (2) On a proposal being filed the property of the debtor shall be deemed to be under the authority of the court pending the final disposition of any proceedings in connection with the proposal and the court may make such order as it deems necessary for the preservation of such property.

#### PROVINCIAL BOARDS OF REVIEW

12. (1) The Governor in Council may, whenever he considers it expedient, establish in any province a Board of Review which shall exercise in such province the jurisdiction hereinafter provided.



- (2) A Board shall consist of a Chief Commissioner and two Commissioners who shall be appointed by the Governor in Council and shall hold office during pleasure and shall receive such remuneration as the Governor in Council may provide.
- (3) The Chief Commissioner shall be a judge of the court of the province invested with original or appellate jurisdiction in bankruptcy by the Bankruptcy Act, and one Commissioner shall be appointed as a representative of creditors and one Commissioner shall be appointed as a representative of debtors. In the event of any Commissioner other than the Chief Commissioner being unable to hear and deal with any case for any reason considered sufficient by the remaining Commissioners, then the remaining Commissioners shall name an *ad hoc* Commissioner to hear and deal with such case with all the powers of the Commissioner whose place he takes. In the event of the Chief Commissioner being unable to hear and deal with any case on the request of the other Commissioners the Minister shall name an *ad hoc* Chief Commissioner with all the powers of the Chief Commissioner. 1935, Ch. 20, Am.
- (4) In any case where the Official Receiver reports that a farmer has made a proposal but that no proposal has been approved by the creditors, the Board shall, on the written request of a creditor or of the debtor, endeavour to formulate an acceptable proposal to be submitted to the creditors and the debtor, and the Board shall consider representations on the part of those interested.
- (5) If any such proposal formulated by the Board is approved by the creditors and the debtor, it shall be filed in the court and shall be binding on the debtor and all the creditors.
- (6) If the creditors or the debtor decline to approve the proposal so formulated, the Board may nevertheless confirm such proposal, either as formulated or as amended by the Board, in which case it shall be filed in the Court and shall be binding upon all the creditors and the debtor as in the case of a proposal duly accepted by the creditors and approved by the Court. 1935, Ch. 20, Am.
- (7) Every request to formulate a proposal shall be dealt with by the full Board, but a determination of the majority

shall be deemed to be the determination of the Board: Provided that the Board may direct any one or more of its members on its behalf to inspect and investigate any or all circumstances of any request for review and report to the Board. 1935, Ch. 20, Am.

- (8) The Board shall base its proposal upon the present and prospective capability of the debtor to perform the obligations prescribed and the productive value of the farm.
- (9) The Board may decline to formulate a proposal in any case where it does not consider that it can do so in fairness and justice to the debtor or the creditors.
- (10) For the purposes of the performance of its duties and functions hereunder a Board shall have the powers of a Commissioner appointed under the Inquiries Act.
- (11) Notwithstanding anything contained in the Bankruptcy Act, an insolvent debtor resident in the Province of Quebec, engaged solely in farming or the tilling of the soil, whose liabilities to creditors provable as debts under the Bankruptcy Act exceed five hundred dollars, may make an assignment for the general benefit of his creditors in any case where the Board declines to formulate a proposal and certifies that in its opinion the debtor's affairs can best be administered under the Bankruptcy Act. 1935, Ch. 20, Am.

In a general sense, insolvency means inability to meet one's debts or obligations; in a technical sense, it means the condition or standard of inability to meet debts or obligations, upon the occurrence of which the statutory law enables a creditor to intervene, with the assistance of a Court, to stop individual action by creditors and to secure administration of the debtor's assets in the general interest of creditors; the law also generally allows the debtor to apply for the same administration. The justification for such proceeding by a creditor generally consists in an act of bankruptcy by the debtor, the conditions of which are defined and prescribed by the statute law. In a normal community it is certain that these conditions will require revision from time to time by the legislature; as also the classes in the community to which the bankruptcy laws are to apply may require reconsideration from time to time. Their Lordships are unable to hold that the statutory conditions of insolvency which enabled a creditor or the debtor to invoke the aid of the bankruptcy laws, or the classes to which these laws applied, were intended to be

stereotyped under head 21 of section 91 of the British North America Act so as to confine the jurisdiction of the Parliament of Canada to the legislative provisions then existing as regards these matters.

Further, it cannot be maintained that legislative provision as to compositions, by which bankruptcy is avoided, but which assumes insolvency, is not properly within the sphere of bankruptcy legislation. (*In re Companies' Creditors Arrangement Act*, (1934) S.C.R. 659.)

It will be seen that from the sections above quoted, the Act here in question relates only to a farmer who is unable to meet his liabilities as they become due, and enables him to make a proposal for a composition, extension of time or scheme for arrangement either before or after an assignment has been made, for which a precedent existed in the Canadian Bankruptcy Act of 1919. As defined in section 2, an assignment means an assignment made under the Bankruptcy Act by a farmer. If the creditors fail to approve of the farmer's proposal, the Board of Review, on the written request of a creditor or the debtor, is to endeavour to formulate "an acceptable proposal" for submission to the creditors and the debtor; if the creditors or the debtor decline to approve the Board's proposal, the Board may nevertheless confirm their proposal, and it is to bind the creditors and the debtor.

Subject to the contention by the appellant, now to be dealt with, their Lordships are of opinion that these provisions fall within head 21 of section 91 of the British North America Act.

The appellant maintains that the real object of these provisions is to keep the farmers on the land for the benefit of agricultural production, and that this object is to be attained by the operations of the Board of Review, who have power to sacrifice the interests of the creditors for the benefit of the debtor farmer; he further maintains that under section 7 the secured creditor may be deprived of that which is his property.

To deal first with the last contention, their Lordships are clearly of opinion that section 7 does not enable any creditor to be deprived of his security, but does enable the proposal for composition to provide for the reduction of the debt itself or an extension of time for its payment, which is a familiar feature of compositions.

The appellant laid stress on the provisions of subsection 8 of section 12, but that does not appear to their Lordships to be an illegitimate or unusual element to be taken into account in the consideration of composition schemes, and indeed the retention of the business under the management of the debtor may well be a consideration in the interests of the creditors as well as of the debtor. Its fair application

appears to be well secured by the provisions of subsections 3, 4 and 9. A judicial Chief Commissioner is provided for under subsection 3; under subsection 4 the Board's proposal is to be designed as an acceptable one to both parties, and this element is emphasized by subsection 9. Their Lordships are unable to accept the contention that the Act is not genuine legislation relating to bankruptcy and insolvency.

Accordingly, the appeal fails, and their Lordships will humbly advise His Majesty that the appeal should be dismissed without costs and that the opinion of the majority of the Supreme Court should be affirmed.













IN THE MATTER of a Reference as to whether the Parliament of Canada had legislative jurisdiction to enact The Weekly Rest in Industrial Undertakings Act, 1935, The Minimum Wages Act, 1935, and The Limitation of Hours of Work Act, 1935.

TEXTS of The Weekly Rest in Industrial Undertakings Act, 1935, The Minimum Wages Act, 1935, The Limitation of Hours of Work Act, 1935, and the Judgments pronounced by the Supreme Court of Canada and by the Judicial Committee of His Majesty's Privy Council.



OTTAWA  
J. O. PATENAUDE, I.S.O.  
PRINTER TO THE KING'S MOST EXCELLENT MAJESTY  
1937



IN THE MATTER of a Reference as to whether the Parliament of Canada had legislative jurisdiction to enact The Weekly Rest in Industrial Undertakings Act, 1935, The Minimum Wages Act, 1935, and The Limitation of Hours of Work Act, 1935.

TEXTS of The Weekly Rest in Industrial Undertakings Act, 1935, The Minimum Wages Act, 1935, The Limitation of Hours of Work Act, 1935, and the Judgments pronounced by the Supreme Court of Canada and by the Judicial Committee of His Majesty's Privy Council.



OTTAWA  
J. O. PATENAUDE, I.S.O.  
PRINTER TO THE KING'S MOST EXCELLENT MAJESTY  
1937





IN THE MATTER of a Reference as to whether the Parliament of Canada had legislative jurisdiction to enact The Weekly Rest in Industrial Undertakings Act, 1935, The Minimum Wages Act, 1935 and The Limitation of Hours of Work Act, 1935.

## I N D E X

|                                                           | PAGE |
|-----------------------------------------------------------|------|
| The Weekly Rest in Industrial Undertakings Act, 1935..... | 5    |
| The Minimum Wages Act, 1935.....                          | 9    |
| The Limitation of Hours of Work Act, 1935.....            | 15   |
| Judgment of the Supreme Court of Canada.....              | 21   |
| Judgment of the Privy Council .....                       | 99   |



# STATUTES OF CANADA, 1935

## CHAPTER 14.

An Act to provide for a weekly day of rest in accordance with the Convention concerning the application of the Weekly Rest in Industrial Undertakings adopted by the General Conference of the International Labour Organization of the League of Nations, in accordance with the Labour Part of the Treaty of Versailles of 28th June, 1919.

*[Assented to 4th April, 1935.]*

WHEREAS the Dominion of Canada is a signatory, as Preamble.  
Part of the British Empire, to the Treaty of Peace made between the Allied and Associated Powers and Germany, signed at Versailles, on the 28th day of June, 1919; and whereas the said Treaty of Peace was confirmed by the Treaty of Peace Act 1919; and whereas by Article 23 of the said Treaty the signatories thereto each agreed that they would endeavour to secure and maintain fair and humane conditions of labour for men, women and children, both in their own countries and in all countries to which their commercial and industrial relations extend, and by Article 427 of the said Treaty it was declared that the well-being, physical, moral and intellectual, of industrial wage-earners is of supreme importance; and whereas a Draft Convention respecting the application of the weekly rest in industrial undertakings was agreed upon at a General Conference of the International Labour Organization of the League of Nations, in accordance with the relevant Articles of the said Treaty, which said Convention has been ratified by Canada; and whereas it is advisable to enact the necessary legislation to enable Canada to discharge the obligations assumed under the provisions of the said Treaty and the said Convention, and to provide for the application of the weekly rest in industrial undertakings, in accordance with the general provisions of the said Convention, and to assist in the maintenance on equitable terms of interprovincial and international trade: Therefore His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

Short title.

1. This Act may be cited as *The Weekly Rest in Industrial Undertakings Act*.

“Industrial undertaking.”

Mines, quarries, etc.

Industries, shipbuilding, electricity or motive power.

Works of construction, maintenance, repair, etc.

Transport of passengers or goods, and handling of goods.

Period of rest of 24 hours in each seven days.

For whole staff simultaneously.

To be on Lord's Day wherever possible.

Persons to whom this section does not apply.

Regulations for total or partial exceptions.

2. In this Act, unless the context otherwise requires, the term “industrial undertaking” includes:—

(a) Mines, quarries, and other works for the extraction of minerals from the earth;

(b) Industries in which articles are manufactured, altered, cleaned, repaired, ornamented, finished, adapted for sale, broken up or demolished, or in which materials are transformed; including shipbuilding and the generation, transformation, and transmission of electricity or motive power of any kind;

(c) Construction, reconstruction, maintenance, repair, alteration, or demolition of any building, railway, tramway, harbour, dock, pier, canal, inland waterway, road, tunnel, bridge, viaduct, sewer, drain, well, telegraphic or telephonic installation, electrical undertaking, gas work, waterwork, or other work of construction as well as the preparation for or laying the foundation of any such work or structure;

(d) Transport of passengers or goods by road or rail including the handling of goods at docks, quays, wharves or warehouses, but excluding transport by hand.

3. (1) The whole of the staff employed in any industrial undertaking, public or private, or in any branch thereof, shall except as otherwise provided for herein be granted by the employer in every period of seven days a period of rest comprising at least twenty-four consecutive hours.

(2) This period of rest shall wherever possible be granted simultaneously to the whole of the staff of each undertaking.

(3) This period of rest shall wherever possible be the Lord's Day as defined in the *Lord's Day Act*, chapter one hundred and twenty-three of the Revised Statutes of Canada, 1927.

(4) The provisions of this section shall not apply in the case of persons holding positions of supervision or management, nor to persons employed in a confidential capacity.

4. (1) The Governor in Council may make regulations authorizing total or partial exceptions including suspensions or diminutions from the provisions of the next preceding section, and in making such regulations shall have special regard to all proper humanitarian and economic consideration, and shall consult with responsible associations of employers or workers whenever such exist.



(2) By such regulations it shall be provided that as far as possible there shall be compensatory periods of rest for the suspensions or diminutions made, except in cases where agreements or customs already provide for such periods.

For compensatory periods of rest.

(3) The regulations shall provide for the communication of the said regulations and amendments thereof to the International Labour Office at Geneva.

To be sent to International Labour Office.

5. Where the weekly rest given does not coincide with the Lord's Day as defined in the *Lord's Day Act*, the employer shall make known the days and hours of rest by means of notices posted conspicuously in the establishment or any other convenient place, or in any other manner determined by the Governor in Council by regulation.

When notice of days and hours of rest to be posted.

6. Subsection two of section five of the *Lord's Day Act* is repealed.

R.S., c. 123, sec. 5, ss. 2 repealed.

7. Every employer who violates, or fails or omits to comply with any provision of this Act shall for each offence be liable on summary conviction to a fine not exceeding one hundred dollars and not less than twenty dollars in addition to any other penalty prescribed by law for the same offence.

Penalty for violation.

8. Nothing in this Act contained except section six thereof shall be construed as amending, repealing, or otherwise affecting the operation of any provision of the *Lord's Day Act*.

Lord's Day Act not affected except by section six hereof.

9. This Act shall come into force three months after the date on which it is assented to.

Commencement of Act.



# STATUTES OF CANADA, 1935

## CHAPTER 44.

An Act to provide for Minimum Wages pursuant to the Convention concerning minimum wages adopted by the International Labour Organization in accordance with the provisions of Part XIII of the Treaty of Versailles and of the corresponding parts of the other treaties of peace.

[Assented to 28th June, 1935.]

WHEREAS the Dominion of Canada is a signatory, as Preamble  
Part of the British Empire, to the Treaty of Peace made between the Allied and Associated Powers and Germany, signed at Versailles, on the 28th day of June, 1919; and whereas the said Treaty of Peace was confirmed by the Treaty of Peace Act 1919; and whereas by Article 23 of the said Treaty the signatories thereto each agreed that they would endeavour to secure and maintain fair and humane conditions of labour for men, women and children, both in their own countries and in all countries to which their commercial and industrial relations extend, and by Article 427 of the said Treaty it was declared that the well-being, physical, moral and intellectual, of industrial wage-earners is of supreme importance; and whereas a Convention concerning minimum wages was adopted as a Draft Convention by the General Conference of the International Labour Organization of the League of Nations in accordance with the relevant articles of the said Treaty, which said Convention has been ratified by Canada; and whereas it is advisable to enact the necessary legislation to enable Canada to discharge the obligations assumed under the provisions of the said Treaty and the said Convention, and to provide for minimum wages in accordance with the provisions of the said Convention, and to assist in the maintenance on equitable terms of interprovincial and international trade: Therefore His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. This Act may be cited as *The Minimum Wages Act*. Short title.

## Definitions.

"Convention."

2. In this Act, unless the context otherwise requires,—

(a) "Convention" means the Convention concerning the creation of minimum wage fixing machinery adopted as a draft convention by the General Conference of the International Labour Organization of the League of Nations at its Eleventh Session in Geneva on the sixteenth of June, 1928, in accordance with the Provisions of Part XIII of the Treaty of Versailles and of the corresponding Parts of the other Treaties of Peace;

"Employer."

(b) "employer" means an employer in a rateable trade;

"Minimum rate of wages."

(c) "minimum rates of wages" means the remuneration, fixed under this Act as payable to workers, whether by way of wages or salary or for piece work, in a rateable trade;

"Minister."

(d) "Minister" means the Minister of Labour;

"Rateable trades."

(e) "rateable trades" means those trades or parts of trades (in particular, home working trades) in which no arrangements exist for the effective regulation of wages by collective agreement or otherwise and wages are exceptionally low;

"Specified rateable trades."

(f) "specified rateable trades" means such rateable trades as, pursuant to section five of this Act, shall be decided and declared to be those to which the minimum wage rate fixing machinery provided pursuant to this Act shall be applied;

"Regulation."

(g) "regulation" means regulation made by or under the authority of the Governor in Council;

"Trade."  
"Trades."

(h) "trade" and "trades" include manufacture and commerce and employment in either thereof;

"Worker."

(i) "worker" means an employed person, male or female, who is not under sixteen years of age.

Minimum rates in specified rateable trades.

3. (1) Such minimum rates of wages as shall, pursuant to this Act, be fixed as payable in specified rateable trades shall be paid by employers to workers in such trades.

Penalty.

(2) Every employer who, being engaged in a specified rateable trade, pays or agrees to pay to any worker employed in that trade wages at less than the minimum rates applicable pursuant to this Act thereto is guilty of an offence against this Act, punishable on summary conviction, and liable to a penalty not exceeding five thousand dollars.

Machinery to fix wages in rateable trades.

4. (1) The Governor in Council may on the recommendation of the Minister create, and by regulation provide for the operation by or under the Minister of, machinery whereby minimum rates of wages can be fixed for workers employed in rateable trades: Provided that the employers and workers concerned shall be associated in the operation of such machinery in such manner and to such extent, but

Proviso.



in any case in equal numbers and on equal terms, as the Governor in Council may by regulation determine.

(2) Minimum rates of wages which have been fixed by way of such machinery shall be binding on the employers and workers concerned so as not to be subject to abatement by them by means of individual agreement, nor, except with the general or particular authorization of the Minister, by collective agreement.

Fixed rates not subject to abatement.

5. (1) The Governor in Council may, on the recommendation of the Minister (made after the Minister has consulted or caused consultation as the Convention requires) decide, and by regulation declare, which trades or parts of trades are those rateable trades to which the minimum wage fixing machinery referred to in section four of this Act shall be applied.

Power to declare what trades are rateable trades.

(2) Such machinery shall be applied only in rateable trades and it shall not be applied in any particular rateable trade until after the Minister has consulted or caused consultation as the Convention requires and has decided and declared by regulation of his Department the nature and form of, and the methods to be followed in the operation of, that machinery, as it shall be applied to that particular trade.

When applicable to any particular rateable trade.

(3) A rateable trade specified as by this section provided is referred to in this Act as a specified rateable trade.

Specified rateable trade.

6. The Governor in Council, subject to the provisions of this Act and in substitution for the provisions of subsection one of section four and for those of section five of this Act, whenever he is satisfied that—

Governor in Council may fix minimum wages if trade injuriously affected or workers oppressed.

(a) the trade and commerce, or the public revenue, of Canada is being injuriously affected by the absence of uniform minimum rates of wages, or

(b) workers throughout Canada are being oppressed by reason of the insufficiency of the wages being paid to them to enable them to maintain a suitable standard of living,

may fix and determine by regulation minimum uniform rates of wages, or fair and suitable rates of wages, as the case may be, to be paid by employers to workers in the trades concerned, and provide or indicate all necessary machinery for enforcing observance and punishing non-observance of such regulation.

7. Notwithstanding anything contained in this Act, the Governor in Council may, by regulation—

Regulations.

(a) provide that the Minister or his nominee may generally or specially permit employers or any employer to pay wages less than the minimum rates of wages

in the case of workers who, by reason of age, infirmity or inexperience, are incapable of doing the work of a competent worker;

- (b) provide that the Minister may authorize any person, including an officer or employee of any provincial government, to act as an inspector or supervisor in connection with the enforcement of this Act;
- (c) ensure that the employers and workers concerned are informed of the minimum rates of wages in force;
- (d) prescribe the procedure whereby regulations or orders fixing minimum rates of wages are made effective, including the manner of proving and publishing them;
- (e) provide that whenever minimum rates of wages have been fixed pursuant to any one part of the machinery provided by or under this Act the rate of wages so fixed shall apply to employers and workers engaged in that trade in lieu of minimum rates of wages fixed in that trade pursuant to any other part of such machinery;
- (f) provide that any board, commission, committee, commissioner or functionary authorized under this Act to fix minimum rates of wages shall have the powers of a commissioner appointed under the *Inquiries Act*;
- (g) provide so that the Minister may permit delays to enable the orderly and proper application of this Act to industry and commerce and all necessary consultation and arrangement with relation thereto to be had and made;
- (h) do such other things as, being consonant with the convention, are necessary for the enforcement of this Act and for carrying out its provisions according to their true intent and meaning.

Inquiry by  
Minister  
as to  
minimum  
wages  
required.

8. (1) The Minister or his nominee may at any time, on the application of representatives of employers or workers, conduct an inquiry as to the minimum rates of wages required to enable a worker to maintain a suitable standard of living.

Powers  
under  
R.S., c. 99.

(2) The Minister or his nominee shall, for the purposes of such inquiry, have the powers of a commissioner appointed under the *Inquiries Act*.

Recovery  
by worker  
of amount  
underpaid.

9. A worker to whom minimum rates of wages are applicable and who has been paid wages at less than minimum rates shall be entitled to recover as an ordinary debt the amount by which he has been underpaid. Alternatively, on any prosecution had under section three of this Act the Court may, in addition to the imposition of any penalty, order payment to the employee concerned of the amount of wages proved to be unpaid or short paid, as

Alternative  
provision.

the case may be, and with relation to such order all provisions of Part XV of the *Criminal Code* shall apply.

**10.** Every person who fails or omits to comply with any provision of this Act or of any regulation or order made thereunder is guilty of an offence punishable on summary conviction and, if no other penalty is prescribed by this Act, liable to a penalty not exceeding fifty dollars. Penalty.

**11.** Nothing in this Act contained shall be construed as relieving any employer from the obligation to pay any minimum wages fixed by or under any provincial statute, if such minimum wages are higher than the relevant minimum wages fixed under this Act. Provincial rates to prevail if higher than relevant rates under this Act.

**12.** Subsection one of section four of this Act and section five of this Act shall not come into force until proclaimed by the Governor in Council. Secs. 4 (1) and 5 come into force on proclamation.





# STATUTES OF CANADA, 1935

## CHAPTER 63.

An Act to provide for limiting the Hours of Work in Industrial Undertakings to eight in the day and forty-eight in the week, in accordance with the Convention concerning the application of the principle of the Eight Hour Day or of the Forty-eight Hour Week adopted by the General Conference of the International Labour Organization of the League of Nations, in accordance with the Labour Part of the Treaty of Versailles of 28th June, 1919.

*[Assented to 5th July, 1935.]*

**W**HEREAS the Dominion of Canada is a signatory, as Preamble.  
Part of the British Empire, to the Treaty of Peace made between the Allied and Associated Powers and Germany, signed at Versailles, on the 28th day of June, 1919; and whereas the said Treaty of Peace was confirmed by the Treaty of Peace Act 1919; and whereas by Article 23 of the said Treaty the signatories thereto each agreed that they would endeavour to secure and maintain fair and humane conditions of labour for men, women and children, both in their own countries and in all countries to which their commercial and industrial relations extend, and by Article 427 of the said Treaty it was declared that the well-being, physical, moral and intellectual, of industrial wage-earners is of supreme importance; and whereas a Draft Convention respecting hours of work in industrial undertakings was agreed upon at a General Conference of the International Labour Organization of the League of Nations, in accordance with the relevant Articles of the said Treaty, which said Convention has been ratified by Canada; and whereas it is advisable to enact the necessary legislation to enable Canada to discharge the obligations assumed under the provisions of the said Treaty and the said Convention, and to provide for the limitation of hours of work in industrial undertakings, in accordance with the general provisions of the said Convention, and to assist in the maintenance on equitable terms of interprovincial and international trade: Therefore His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

Short title.

**1.** This Act may be cited as *The Limitation of Hours of Work Act*.

“Industrial undertaking.”

Mines, quarries, etc.

Industries, shipbuilding, electricity or motive power.

Works of construction, maintenance, repair, etc.

Transport of passengers or goods, and handling of goods.

Eight hours in the day, forty-eight in the week.

Distinction between industry, commerce and agriculture.

Persons to whom section three does not apply.

If less than eight hours in one or more days in the week.

Proviso.

**2.** In this Act, unless the context otherwise requires, the term “industrial undertaking” includes:

(a) Mines, quarries, and other works for the extraction of minerals from the earth;

(b) Industries in which articles are manufactured, altered, cleaned, repaired, ornamented, finished, adapted for sale, broken up or demolished, or in which materials are transformed; including shipbuilding and the generation, transformation, and transmission of electricity or motive power of any kind;

(c) Construction, reconstruction, maintenance, repair, alteration, or demolition of any building, railway, tramway, harbour, dock, pier, canal, inland waterway, road, tunnel, bridge, viaduct, sewer, drain, well, telegraphic or telephonic installation, electrical undertaking, gas work, waterwork or other work of construction, as well as the preparation for or laying the foundations of any such work or structure;

(d) Transport of passengers or goods by road or rail, including the handling of goods at docks, quays, wharves or warehouses, but excluding transport by hand.

**3.** (1) No person shall employ or require or permit any person to work in any public or private industrial undertaking or in any branch thereof other than an undertaking in which only members of the same family are employed for hours in excess of eight in the day and forty-eight in the week except in the cases hereinafter provided for.

(2) The Governor in Council may define the line of division which separates industry from commerce and agriculture for the purpose of determining the employers and the employees to whom this Act shall apply.

**4.** The provisions of section three of this Act shall not apply to persons holding positions of supervision or management, nor to persons employed in a confidential capacity.

**5.** Where by law, custom, or agreement between employers' and workers' organizations, or, where no such organizations exist, between employers' and workers' representatives, the hours of work on one or more days of the week are less than eight, the limit of eight hours may be exceeded on the remaining days of the week by the sanction of the Governor in Council or by agreement between such organizations or representatives: Provided, however, that in no such case shall the daily limit of eight hours be exceeded by more than one hour.

**6.** Where persons are employed in shifts it shall be permissible to employ persons in excess of eight hours in any one day and forty-eight hours in any one week if the average number of hours over a period of three weeks or less does not exceed eight per day and forty-eight per week.

Persons employed in shifts.

**7.** The limit of hours of work prescribed in this Act may be exceeded in case of accident, actual or threatened, or in case of urgent work to be done to machinery or plant, or in case of *vis major*, but only so far as may be necessary to avoid serious interference with the ordinary working of the undertaking.

Urgency or *vis major*.

**8.** The limit of hours of work prescribed in this Act may be exceeded in those processes which are required, by reason of the nature of the process, to be carried on continuously by a succession of shifts: Provided, however, that the working hours shall not exceed fifty-six in the week on the average. Such regulation of the hours of work shall in no case affect any rest days which may be secured by the law of Canada to the workers in such processes in compensation for the weekly rest day.

In case of continuity by a succession of shifts.

Proviso.

**9.** The Governor in Council may, in exceptional cases where it is recognized that the daily limit of hours of work cannot be applied and agreements between workers' and employers' organizations to increase the daily limit have been made, give effect to such agreements and permit in such cases the said daily limit of hours to be exceeded: Provided, however, that the average number of hours per week over the number of weeks covered by such agreement shall not exceed forty-eight; and provided, further, that in case such an agreement has been made prior to the thirty-first day of December, 1934, between a railway company and any employees' organization which embodies the basic principle of eight hours as the daily period of employment, the provisions of such agreement relating to the hours of employment shall, notwithstanding anything contained in this Act, continue in force for a period of three months from the date of the coming into force of this Act.

Exceptional cases.

Proviso.

**10.** (1) Whenever the Governor in Council, after consultation as required by the Convention mentioned in the preamble to this Act has been had, is satisfied that the work, or any class of work, in any industrial undertaking or class of industrial undertakings is—

Regulations may except employment in any industry under prescribed conditions.

(a) preparatory or complementary, so that it must necessarily be carried on outside the limits laid down for the general working of an establishment; or



(b) essentially intermittent, as when it—

(i) does not require that the worker be continuously occupied during the hours of employment; or

(ii) is such that it must necessarily be performed in variable periods of employment; or

(iii) is, in its nature, either seasonal or subject to intervals of discontinuance or to variations in the supply of raw materials; or

(c) exceptional, owing to pressure of work for the time being;

the Governor in Council may, by regulation, except all or any employment at such work or class of work in such industrial undertaking or class of industrial undertakings from application thereto of the limits of hours fixed by this Act.

Fair and humane conditions of labour.

(2) Such regulations shall provide so that fair and humane conditions of labour, with relation to hours of work, shall prevail in such excepted employment, and so that any regulation made by reason of pressure of work shall be temporary in character.

Maximum of hours.

(3) Whenever it is practicable the maximum of additional hours permitted under this section shall be fixed by the regulations, and in such case the rate of pay for overtime shall not be less than one and one quarter times the regular rate.

Pay for overtime.

Duties of employers.

**11.** Every employer shall,

Notices of hours of work.

(a) notify by means of the posting of notices in conspicuous places in the works or other suitable place, or by such other method as may be approved by the Governor in Council, the hours at which work begins and ends and where work is carried on by shifts, the hours at which each shift begins and ends. These hours shall be so fixed that the duration of the work shall not exceed the limits prescribed by this Act, and when so notified they shall not be changed except with such notice and in such manner as may be approved by the Governor in Council;

Notices of rest intervals.

(b) notify in the same way such rest intervals accorded during the period of work as are not reckoned as part of the working hours;

Record of additional hours.

(c) keep a record in the form prescribed by or under the authority of the Governor in Council, of all additional hours worked, as permitted under sections seven and ten of this Act.

Regulations to be published.

**12.** Regulations of the Governor in Council made under this Act shall be published in the *Canada Gazette*.



**13.** Every employer who violates, or fails or omits to comply with any provision of this Act or of any regulation made thereunder, shall be guilty of an offence against this Act and for each offence be liable on summary conviction to a fine not exceeding one hundred dollars in addition to any other penalty prescribed by law for the same offence.

Offences  
and  
penalties.

**14.** Nothing in this Act contained shall be construed as relieving any employer from any obligation under any provincial statute establishing shorter hours of work than those established under this Act.

Provincial  
statutes  
fixing  
shorter  
hours not  
affected.

**15.** This Act shall come into force three months after the date on which it is assented to.

When Act  
comes into  
force.



# JUDGMENT OF THE SUPREME COURT OF CANADA

(1936)  
S.C.R. 461.

IN THE MATTER OF A REFERENCE AS TO WHETHER THE PARLIAMENT OF CANADA HAD LEGISLATIVE JURISDICTION TO ENACT THE WEEKLY REST IN INDUSTRIAL UNDERTAKINGS ACT, BEING CHAPTER 14 OF THE STATUTES OF CANADA, 1935; THE MINIMUM WAGES ACT, BEING CHAPTER 44 OF THE STATUTES OF CANADA, 1935; AND THE LIMITATION OF HOURS OF WORK ACT, BEING CHAPTER 63 OF THE STATUTES OF CANADA, 1935.

\* Jan. 23, 24,  
27, 29, 30, 31.  
\* June 17.

*Constitutional law—The Weekly Rest in Industrial Undertakings Act, 25-26 Geo. V, c. 14—The Minimum Wages Act, 25-26 Geo. V, c. 44—The Limitation of Hours of Work Act, 25-26 Geo. V, c. 63—Constitutional validity—Treaty of Peace of Versailles, 1919—Art. 405 of the Treaty—League of Nations—Draft Conventions of the International Labour Conference—Approval of Treaty by Dominion Parliament—B.N.A. Act, s. 132—Property and civil rights—B.N.A. Act, s. 92.*

The *Weekly Rest in Industrial Undertakings Act*, which gave effect to the Draft Convention of the International Labour Conference on that subject, applies to industrial undertakings as defined in art. 1 of the Draft Convention, and requires employers to grant a rest period of at least twenty-four consecutive hours in every seven days to all employees, with the exception of persons who hold positions of supervision or management or who are employed in a confidential capacity. The rest period is, wherever possible, to be granted to the whole staff simultaneously, and to coincide with the Lord's Day as defined by the Lord's Day Act, R.S.C. 1927, c. 123. *The Minimum Wages Act* is designed to give effect to the provisions of the draft Convention concerning the creation of minimum wage-fixing machinery adopted by the International Labour Conference in 1928. By s. 4 (1), the Governor in Council, on the recommendation of the Minister of Labour, may create and by regulation provide for the operation, by or under the Minister, of machinery whereby minimum rates of wages can be fixed for workers in specified rateable trades. Employers and workers concerned are to be associated in the operation of such machinery in such manner as the Governor in Council may by regulation determine, but in any case in equal numbers and on equal terms. "Rateable trades" are defined in accordance with the terms of the Convention as "those trades or parts of trades (in particular, home-working trades) in which no arrangements exist for the effective regulation of wages by collective agreement or otherwise and wages are exceptionally low." "Trade" includes manufacture and commerce and "worker" includes any employed person not under 16 years of age. By s. 4 (2), Minimum wages so fixed are to be binding on employers and workers concerned so as not to be subject to abatement by means of individual agreement, or, except with the general or particular authorization of the Minister, by collective agreement.

---

\* PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket, Davis and Kerwin JJ.

1936  
 ~~~~~  
 REFERENCE
 re
 THE WEEKLY
 REST IN
 INDUSTRIAL
 UNDER-
 TAKINGS ACT,
 THE
 MINIMUM
 WAGES ACT,
 AND THE
 LIMITATION
 OF HOURS OF
 WORK ACT.

The Limitation of Hours of Work Act gives effect to the Draft Convention of the International Labour Conference adopted in 1919, limiting hours of work in industrial undertakings as defined in article 1 of the Convention.

Held, per Duff C.J. and Davis and Kerwin JJ., that these Acts are intra vires of the Parliament of Canada; per Rinfret, Cannon and Crocket JJ., that they are ultra vires.

Per Duff C.J. and Davis and Kerwin JJ.—From two main considerations, the conclusion follows that legislative authority in respect of international agreements is, as regards Canada, vested exclusively in the Parliament of Canada. First, by virtue of section 132 of the *British North America Act*, jurisdiction, legislative and executive, for the purpose of giving effect to any treaty obligation imposed upon Canada, or any one of the provinces of Canada, by force of a treaty between the British Empire and a foreign country, is committed to the Parliament and Government of Canada. This jurisdiction of the Dominion the Privy Council held, in the *Aeronautics* case and in the *Radio* case ([1932] A.C. 54 and 304) is exclusive; and consequently, under the *British North America Act*, the provinces have no power and never had power to legislate for the purpose of giving effect to an international agreement: that, as a subject of legislation, is excluded from the jurisdiction envisaged by section 92. Second, as a result of the constitutional development of the last thirty years (and more particularly of the last twenty years) Canada has acquired the status of an international unit, that is to say, she has been recognized by His Majesty the King, by the other nations of the British Commonwealth of Nations, and by the nations of the world, as possessing a status enabling her to enter into, on her own behalf, international arrangements, and to incur obligations under such arrangements. These arrangements may take various forms. They may take the form of treaties, in the strict sense, between heads of states, to which His Majesty the King is formally a party. They may take, *inter alia*, the form of agreements between governments, in which His Majesty does not formally appear, Canada being represented by the Governor General in Council or by a delegate or delegates authorized directly by him. Whatever the form of the agreement, it is now settled that, as regards Canada, it is the Canadian Government acting on its own responsibility to the Parliament of Canada which deals with the matter. If the international contract is in the form of a treaty between heads of states, His Majesty acts, as regards Canada, on the advice of His Canadian Government.

Necessarily, in virtue of the fundamental principles of our constitution, the Canadian Government in exercising these functions is under the control of Parliament. Parliament has full power by legislation to determine the conditions under which international agreements may be entered into and to provide for giving effect to them. That this authority is exclusive would seem to follow inevitably from the circumstances that the Lieutenant-Governors of the provinces do not in any manner represent His Majesty in external affairs, and that the provincial governments are not concerned with such affairs; the effect of the two decisions above referred to is that in all these matters the authority of Parliament is not merely paramount, but exclusive.

The first of the two cardinal questions raised by the contentions of the provinces has two branches, and may be stated thus: Has Parliament authority to legislate for carrying out a treaty or convention or agreement with a foreign country containing stipulations to which effect can only be given by domestic legislation changing the law of the provinces (a) in matters committed by the *British North America Act* (in the absence of any such international agreement) to the legislatures of the provinces exclusively, and (b) in relation to such matters where they are *ex facie* of domestic concern only and not of international concern, such, for example, as the matters dealt with by the conventions to which effect is given by the statutes now before the Court: the regulation of wages and of hours of labour.

1936
REFERENCE
re
THE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.

The view that the exclusive authority of Parliament extends to international treaties and agreements relating to such subjects rests on the grounds now outlined. (1) As touching the view advanced that the subject-matters of the stipulations in the international agreements in question are of exclusively domestic and not at all of international concern: the language of section 132 B.N.A. Act is unqualified and that section would appear *prima facie* to extend to any treaty with a foreign country in relation to any subject-matter which in contemplation of the rules of constitutional law respecting the royal prerogative concerning treaties would be a legitimate subject-matter for a treaty; and there would appear to be no authority for the proposition that treaties in relation to subjects, such as the subject-matter of the status in question are not within the scope of that prerogative. Legislative authority to give effect to treaties within section 132 remained, of course, after the B.N.A. Act, down to the enactment of the Statute of Westminster in the Imperial Parliament, although by section 132, it also became and is vested in the Parliament of Canada; but, since the Statute of Westminster, no Act of the Imperial Parliament can have effect in Canada without the consent of Canada. The practice of modern times and, in particular, the provisions of the Covenant of the League of Nations embodied in the Treaty of Versailles would appear to demonstrate that by common consent of the nations of the world, such matters are regarded as of high international as well as of domestic concern and proper subjects for treaty stipulation. (2) As touching the view that the legislative authority committed to the Parliament and Government of Canada by section 132 (and by the introductory clause of section 91 in relation to international matters) does not extend to matters which would fall exclusively within the legislative jurisdiction of the provinces, in the absence of any international obligation respecting them, it is to be observed: First, section 132 relates *inter alia* to obligations imposed upon any province of Canada by any treaty between the British Empire and a foreign country. Section 132 obviously contemplates the possibility of such an obligation arising as a diplomatic obligation under such a treaty, even although legislation might be necessary in or to attach to it the force of law. In such case, the Parliament and Government of Canada appear to be endowed with the necessary legislative and executive powers. This provision with regard to the obligations of the provinces taken together with the generality of the language employed in section 132 would seem to point rather definitely to the conclusion that the view under consideration is not tenable.

1936

REFERENCES
re
 THE WEEKLY
 REST IN
 INDUSTRIAL
 UNDER-
 TAKINGS ACT,
 THE
 MINIMUM
 WAGES ACT,
 AND THE
 LIMITATION
 OF HOURS OF
 WORK ACT.

Secondly, the established practice of the Parliament of Canada and the decisions of the Courts in relation to that practice do not accord with this view. Statutes giving effect to the International Waterways Treaty (1911) with the United States, and the Treaty with Japan (1913) are instances in which treaties dealing with matters of civil right within the provinces and the management of the public property of the provinces were given the force of law by Dominion statutes. The legislation concerning the Japanese Treaty was held to be valid and to nullify a statute of the province inconsistent with it by the Judicial Committee of the Privy Council in *Attorney-General for British Columbia v. Attorney-General for Canada*, ([1924] A.C. 203).

The jurisdiction of Parliament to enforce international obligations under agreements which are not strictly "treaties" within section 132 is co-ordinate with the jurisdiction under this last named section.

It is contended by the provinces that the Dominion cannot, by reason merely of the existence of an international agreement (within section 132 or within the residuary clause) possess legislative authority enabling the Parliament of Canada to legislate in derogation of certain fundamental terms which, it is said, were the basis of the Union of 1867, and are expressly or impliedly embodied in the B.N.A. Act. For the purposes of the present reference, it is unnecessary to make any observation upon this contention further than what has already been said, viz., that the exclusive authority of the Dominion to give the force of law to an international agreement is not affected by the circumstances alone that, in the absence of such an agreement, the exclusive legislative authority of the provinces would extend to the subject-matter of it.

The second of the cardinal questions requiring determination concerns the construction and effect of article 405 of the Treaty of Versailles.

The draft conventions now in question were brought before the House of Commons and the Senate, received the assent of both Houses in the form of resolutions, which resolutions approved the ratification of them, and the statutes in question were passed for the purpose of giving legislative effect to their stipulations, the operative clauses of the statute being in each case preceded by a preamble in which it is recited that the draft conventions have been ratified by Canada. The procedure followed, if we put aside the provisions of article 405, was the usual and proper procedure for engaging in and giving effect to agreements with foreign governments. The propriety of this procedure is questioned on the ground that under the special provisions of article 405, and especially those of paragraphs 5 and 7 of the article, it was an essential condition of the jurisdiction of Parliament to legislate for the enforcement of the conventions that the conventions should have been submitted to, and should have received the assent of, the provincial legislatures before the enactment of such legislation by Parliament.

Paragraphs 5 and 7 must be read together and, reading them together, it would appear that the "competence" postulated is the "competence" to enact legislation or to take other "action" contemplated by the article.

The obligations upon consent of the competent authority or authorities to ratify and, upon like consent after ratification, "to make effective the provisions of the convention" are both treaty obligations; and the authority or authorities competent to take legislative action where

legislative action may be necessary to make the provisions of the convention effective would appear plainly to be included within the authority or authorities before whom it is provided that the draft conventions shall be brought.

1936
REFERENCES
re
THE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.

It follows from what has been said that this treaty obligation is an obligation within section 132 and, consequently, that the authority to make the convention effective exclusively rests in the Parliament and Government of Canada and, therefore, that the Parliament of Canada is, at least, one of the authorities before which the convention must be brought under the terms of article 405. The provincial legislatures may also be competent authorities within the contemplation of paragraph 5 of that article, but it is unnecessary to decide that question for the purposes of this reference.

The Governor General in Council is designated by the *Treaties of Peace Act*, 1919, enacted under the authority of section 132, to take all such measures as may seem to him to be necessary for the purpose of carrying out the *Treaties of Peace* and for giving effect to the terms of such treaties. He it was, therefore, upon whom devolved the duty of performing the obligation of Canada under art. 405 to bring the draft convention before the authority or authorities possessing "competence" under the Constitution of Canada. He it was also on whom devolved the duty to communicate to the League of Nations the ratification by Canada upon the assent of the competent authority or authorities. Moreover, the Parliament of Canada, possessing exclusive jurisdiction in relation to international agreements, the creation as well as the enforcement of them, declared, by the statutes now under examination, that the conventions in question were ratified by Canada. The executive authority, therefore, charged with the duty of acting for Canada in performing the treaty obligations, of submitting the conventions to the proper constitutional authorities and of communicating ratification to the League of Nations upon the assent of those authorities, and His Majesty the King in Parliament have, in effect, combined in declaring that the ratification was assented to by the proper constitutional authorities of Canada in conformity with the stipulations of art. 405. That would appear to be sufficient to constitute a diplomatic obligation binding upon Canada to observe the provisions of the conventions.

Per Rinfret J.—Apart from any consideration resulting from their aspect as laws intended to carry out the obligations of Canada under Draft Conventions agreed upon at general conferences of the International Labour Conference of the League of Nations, the subject-matter of these Acts is undoubtedly one in relation to which, under the Constitution of our country, the legislature in each province may exclusively make laws. It follows that, in order to support the validity of the Acts, the Attorney-General of Canada has the burden of demonstrating that, in the premises, the subject-matter of the disputed legislation has, for some special reason, been transferred to the jurisdiction of the Parliament of Canada.

The Acts cannot be supported as an exercise of the legislative powers of the Dominion either to make laws for the peace, order and good government of Canada, or for the regulation of trade and commerce, or in relation to the criminal law.

1936
REFERENCES
re
THE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.

These conventions are not treaties within the meaning of section 132 of the B.N.A. Act, such as was the case in the *Aeronautics* Reference to the Privy Council ([1932] A.C. 54); nor are they conventions belonging to that class of conventions submitted to the Privy Council in the *Radio* Reference ([1932] A.C. 304). So that the judgments of the Privy Council in those two References do not constitute authorities in support of the Dominion Government's or the Dominion Parliament's power to act alone in the performance of the obligations deriving from conventions of the present character.

Besides that, both in the *Aeronautics* and in the *Radio* references, the Privy Council, at the same time as it declared that the validity of the legislation in respect thereto could be supported as an exercise of the power derived from section 132, B.N.A. Act, or from the residuary power to make laws for the peace, order and good government of the country, also came to the conclusion that the subject of aeronautics and the subject of radio came under one or more of the enumerated heads of section 91 of the B.N.A. Act, which is not the case here.

But the critical point in the present reference is whether the Draft Conventions were competently ratified—a point which was not raised nor decided in the *Aeronautics* or *Radio* references.

A very great distinction must be made between the power to create an international obligation and the power to perform it when once it has been created.

Under the distribution of legislative powers, the subject-matters of the three Acts now submitted are assigned to the exclusive jurisdiction of the legislature in each province under the head "Property and Civil Rights in the Province," of section 92, B.N.A. Act. A civil right does not change its nature just because it becomes the subject-matter of a convention with a foreign state. It is always the same civil right. It is not within the spirit of the Constitution that the Dominion Parliament might acquire exclusive jurisdiction over such matters merely as a consequence of the fact that the Dominion Government, in regard to them, decides to enter into a convention with a foreign power. It would be directly against the intendment of the B.N.A. Act that the King or the Governor General of Canada should enter into an international agreement dealing with matters exclusively assigned to the jurisdiction of the provinces solely upon the advice of the Federal Ministers, who, either by themselves or through the instrumentality of the Dominion Parliament, are prohibited by the Constitution from assuming jurisdiction over these matters.

Moreover, article 405 of the Treaty of Versailles must be interpreted as requiring, in Canada, the consent and approval of the provinces before Draft Conventions of the nature of those now submitted can be properly and competently ratified by Canada as a member of the League of Nations.

In this Court, the question as to where lies the power to create an international obligation dealing with matters within the exclusive jurisdiction of the provinces is concluded by our decision on the reference *Re: Legislative Jurisdiction over Hours of Labour* ([1925] S.C.R. 505).

It follows that the Draft Conventions not having received the consent and the approval of the legislatures of the provinces, nor even of the pro-

vincial governments, were not properly and competently ratified; and the Acts adopted in relation to these Draft Conventions and allegedly for the purpose of performing the obligations arising under them are *ultra vires* of the Parliament of Canada.

1936
REFERENCES
TO
THE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.

Per Cannon J.—When an Act of Parliament is challenged before this Court as unconstitutional, the article of the Constitution which is invoked should be laid beside the statute which is challenged in order to decide whether the latter squares with the former. The only power of this Court is to announce its judgment upon the question. This Court neither approves nor condemns any legislative policy. Its office is to ascertain and declare whether the legislation is in accordance with or in contravention of the provisions of the Constitution. The question is not what power the Federal Government ought to have, but what powers, in fact, have been given to it by the B.N.A. Act. There is in this country a dual form of government, and in every province there are two governments. Our country differs from nations where all legislative power, without restriction, is vested in a parliament, or other legislative body, subject to no restriction.

If any changes are required to face new situations or to cope with the increased importance of Canada as a nation, they may be secured by an amendment to the B.N.A. Act; but neither this Court nor the Privy Council should be called upon to legislate outside of its provisions.

The labour draft conventions in this case, binding Canada independently from the rest of the Empire, do not fall under section 132, B.N.A. Act; they were not even contemplated as feasible in 1867 when that Act was passed. Radio and aeronautics are also new matters not existing at that time and had to be dealt with by the Privy Council as outside the enumerated subjects of 91 and 92 B.N.A. Act; and these two decisions must be considered as *arrêts d'espèce* and confined to the subject-matters which both had necessarily interprovincial and international aspects.

But the payment of wages for labour, the weekly rest and the rate of wages and length of hours of work were well known subjects in 1867 and they were, by common agreement, reserved by the Imperial Parliament to the provinces as purely local and private matters of property and civil rights.

Therefore, in the words of section 405 of the Treaty of Versailles, Canada as a federal state has only a "power to enter into convention on labour matters *subject to limitations*" and the draft conventions should have been treated as "recommendation only." Such recommendation is to be submitted to the members for "consideration with a view to effect being given to it by national legislation or otherwise." The Versailles Treaty recognizes that in certain cases, effect can be given to a labour agreement "otherwise" than by national legislation. In these cases, it does not appear that either the recommendations or the draft conventions were submitted to the provinces, i.e., the "authorities within whose competence the matter lies for the enactment of legislation or other action"; and this is fatal to the validity of the ratification of these labour conventions by the Federal authorities.

1936
REFERENCES
re
THE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.

As an internal matter, such changes in the respective constitutional powers of the provinces and of the Central Government cannot be justified by invoking some clauses of the Treaty of Versailles. Respect of their property and civil rights was guaranteed by the British Crown to the inhabitants of the original provinces as far back as the Treaty of Paris in 1763; this was confirmed by the constitution of 1867 which cannot be changed in this essential part except by an Imperial statute, as plainly set forth in the Act of Westminster of 1931, section 7. Therefore the Parliament and the Government of Canada cannot appropriate those powers, exclusively reserved to the provinces, by the simple process of ratifying a labour convention passed at Geneva with representatives of foreign countries. Neither the Governor General in Council, nor Parliament, can in any way, and specifically by an agreement with a foreign power, change the constitution of Canada or take away from the provinces their competency to deal exclusively with the enumerated subjects of section 92, B.N.A. Act. Before accepting as binding any agreement under section 405 of the Treaty of Versailles, foreign powers must take notice that this country's constitution is a federal, not a legislative union.

Per Crocket J.—The Acts passed by the Dominion Parliament embody legislation which is directly aimed at the regulation and control of contracts of employment, private as well as public, in every province of the Dominion, and thus deal in a very real and radical sense with civil rights in all the provinces of Canada alike; and the fundamental question before this Court is whether there is any authority within the B.N.A. Act for the exercise of such legislative power by the Parliament of Canada.

None of the draft conventions of the International Labour Conference of the League of Nations, upon the ratification of which by the Government of Canada, it has been sought to justify the enactment of this legislation, fall within the terms of section 132 of the B.N.A. Act. Even if the Treaty of Versailles were a treaty between the British Empire, as an undivided unit, and those foreign states, whose plenipotentiaries signed it, and not a treaty purporting to have been entered into by the self-governing Dominions of the Empire as separate governments, it could not be said that there was any obligation for the performance of which the Parliament of Canada was empowered within the terms of section 132 to enact legislation as pertaining to an obligation imposed by that treaty upon Canada or any province thereof, as part of the British Empire.

As regards the residuary clause of section 91, this provision can only be invoked where the real subject-matter of the legislation does not fall within the classes of subjects which are exclusively assigned to the provinces by section 92; once it appears that the real purpose and effect of a Dominion enactment is to interfere with private and civil rights in the provinces and that in that aspect it consequently falls within the sphere of legislation which has been exclusively reserved for the provinces, not only by the provisions of section 92, but by the saving clause in the introduction of section 91, such an enactment cannot be justified under the general authority conferred on the Parliament of Canada. If such legislation could be maintained on the ground that it was for the peace, order and good government of Canada, it could only be by ignoring the explicit limita-

tion, which is placed on the so-called general authority by the residuary clause itself with the obvious intention of preventing its application in the very sense now contended for, and thus protecting the provinces in the full enjoyment of their exclusive legislative rights as permanently guaranteed to them by section 91.

Although the Government of Canada must now be held to be the proper medium for the formal conclusion of international conventions, whether they affect the Dominion as a whole or any of the provinces separately, this fact cannot be relied on as altering in any way the provisions of the B.N.A. Act as regards the distribution of legislative power as between the Dominion Parliament and the provincial legislatures or as necessarily giving to any matter, which may be made the subject of legislation in Canada, any other meaning or aspect than that which it bears in our original constitution. Whether such a matter is one which falls under the terms of either section 91 or of section 92 or of section 132, must depend upon the real intendment of the B.N.A. Act itself, as gathered from the terms of those sections and the Act as a whole.

The legislation embodied in these three statutes is legislation which the Parliament of Canada has enacted to give effect to the draft conventions of the International Labour Conference of the League of Nations. These conventions are admittedly conventions, to which the Government of Canada were in no manner bound to assent or to formally ratify. They were submitted to the Government of this country as mere draft conventions, and stood as such until 1935, when the Government of Canada chose to approve them, several years after the expiration of the period fixed by article 405 of the Treaty of Versailles for their submissions "to the authority or authorities within whose competence the matter lies for the enactment of legislation or other action." The provision of article 405 of the Peace Treaty of Versailles is clearly mandatory and not merely directory and the ratification of the conventions, upon which these three statutes purport to be founded, is null and void under the terms of that article. However, the provisions of the B.N.A. Act, not the terms of the Treaty of Versailles, should be looked at for the answers to the questions submitted on this reference concerning the constitutionality of these three statutes; and, accordingly, they are *ultra vires* of the Parliament of Canada.

REFERENCES by His Excellency the Governor General in Council to the Supreme Court of Canada, in the exercise of the powers conferred by section 55 of the *Supreme Court Act* (R.S.C. 1927, c. 35), of the following questions: Are *The Weekly Rest in Industrial Undertakings Act*, *The Minimum Wages Act* and *The Limitation of Hours of Work Act*, or any of the provisions thereof and in what particular or particulars or to what extent, *ultra vires* of the Parliament of Canada?

The Order in Council referring the questions to the Court read as follows:

1936
REFERENCES
re
THE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.

1936
REFERENCES
THE WEEKLY
REST IN
INDUSTRIAL
UNDERTAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.

The Committee of the Privy Council have had before them a report, dated 31st October, 1935, from the Minister of Justice, referring to the following Acts contained in the statutes of Canada, 1935, namely—

The Weekly Rest in Industrial Undertakings Act, cap. 14;

The Minimum Wages Act, cap. 44; and

The Limitation of Hours of Work Act, cap. 63,

which were respectively passed, as appears from the recitals set out in the preambles of the said Acts, for the purpose of enacting the necessary legislation to enable Canada to discharge certain obligations declared to have been assumed by Canada under the provisions of the Treaty of Peace made between the Allied and Associated Powers and Germany, signed at Versailles, on the 28th day of June, 1919, and to which Canada, as part of the British Empire, was a signatory, and also under certain draft conventions concerning (a) the application of the weekly rest in industrial undertakings, (b) the creation of minimum wage fixing machinery, and (c) the limitation of hours of work in industrial undertakings, respectively adopted by the International Labour Conference in accordance with the relevant articles of the said Treaty.

The Minister observes that doubts exist or are entertained as to whether the Parliament of Canada had jurisdiction to enact the said Acts or any of them either in whole or in part, and that it is expedient that such questions should be referred to the Supreme Court of Canada for judicial determination.

The Committee, accordingly, on the recommendation of the Minister of Justice, advise that the following questions be referred to the Supreme Court of Canada, for hearing and consideration, pursuant to section 55 of the *Supreme Court Act*,—

1. Is *The Weekly Rest in Industrial Undertakings Act*, or any of the provisions thereof and in what particular or particulars or to what extent, *ultra vires* of the Parliament of Canada?

2. Is *The Minimum Wages Act*, or any of the provisions thereof and in what particular or particulars or to what extent, *ultra vires* of the Parliament of Canada?
3. Is *The Limitation of Hours of Work Act*, or any of the provisions thereof and in what particular or particulars or to what extent, *ultra vires* of the Parliament of Canada?

1936
REFERENCES
THE WEEKLY
REST IN
INDUSTRIAL
UNDERTAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.
Duff C.J.

E. J. LEMAIRE,
Clerk of the Privy Council.

* The judgment of Duff C.J. and Davis and Kerwin JJ. was delivered by

DUFF C.J.—The validity of the legislation is attacked on various grounds which will be stated presently.

The draft convention respecting minimum wage fixing machinery was adopted by the General Council of the Labour Organization of the League of Nations on the 6th June, 1928, and a copy was communicated to Canada on August 23rd, 1928.

Resolutions declaring it to be “expedient that Parliament do approve of” the draft convention were passed by the House of Commons (on March 15th, 1935) and by the Senate (on April 2nd, 1935).

The draft convention was, under art. 7 thereof, transformed into a “convention,” by the assent of two members of the Labour Organization on the 14th June, 1930. On the 12th April, 1935, the Governor General, by Order in Council, ordered on behalf of Canada that the convention “be confirmed and approved” and that “formal communication” of this confirmation and approval “be made to the Secretary General of the League of Nations.” On 25th April, 1935, the formal instrument of ratification was deposited with the Secretary of the League of Nations. The statute in controversy was assented to on the 28th of June, 1935, in which there is the following preamble:

Whereas the Dominion of Canada is a signatory, as part of the British Empire, to the Treaty of Peace made between the Allied and Associated

* *Reporter's note:* Counsel on the argument of this Reference were the same as those mentioned at p. 365.

1936
REFERENCES
re
THE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.

Duff C.J.

Powers and Germany, signed at Versailles, on the 28th day of June, 1919; and whereas the said Treaty of Peace was confirmed by the *Treaty of Peace Act, 1919*; and whereas by article 23 of the said Treaty the signatories thereto each agreed that they would endeavour to secure and maintain fair and humane conditions of labour for men, women and children, both in their own countries and in all countries to which their commercial and industrial relations extend, and by article 427 of the said Treaty it was declared that the well-being, physical, moral and intellectual, of industrial wage-earners is of supreme importance; and whereas a Convention concerning minimum wages was adopted as a Draft Convention by the General Conference of the International Labour Organization of the League of Nations in accordance with the relevant articles of the said Treaty, which said Convention has been ratified by Canada; and whereas it is advisable to enact the necessary legislation to enable Canada to discharge the obligations assumed under the provisions of the said Treaty and the said Convention, and to provide for minimum wages in accordance with the provisions of the said Convention, and to assist in the maintenance on equitable terms of interprovincial and international trade: Therefore His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

The immediate question put in precise form is this: Is the statute which, by its preamble, recites the adoption of the draft convention by the General Conference of the Labour Organization and the ratification of that convention by Canada, constitutionally effective, without the assent of the provinces, to alter the law of those provinces by bringing that law into conformity with the stipulations of the convention so ratified: the matter of these stipulations being, *ex hypothesi*, normally, (and saving certain specific fields of legislation with which we are not concerned) a subject matter of legislation within the exclusive competence of the respective provincial legislatures under section 92 of the B.N.A. Act?

The principal points now in controversy arise upon these contentions of the provinces:

First, that the Governor General in Council has no authority to enter into any international engagement; second, that, since the subject matter of the convention falls within the subdivision of s. 92, which relates to property and civil rights within the provinces, the assent of the provincial legislatures was an essential condition of a valid ratification under art. 405 of the Labour Part of the Treaty.

Third, that in view of the character of its subject matter, the provinces alone are competent to give the force of law to the Convention.

We shall discuss in another place (in the reasons for the answers in the Reference concerning the *Natural Products Marketing Act*) (p. 403) the contention that the Dominion, independently of her powers in respect of international obligations, possessed authority in the circumstances of the time to enact the statute under the residuary power to make laws for the peace, order and good government of Canada.

As a step preliminary to the examination of the arguments addressed to us in support of these contentions, some brief observations upon the legislative and executive authority of the Parliament and Government of Canada in respect of international agreements may be useful.

An interesting and valuable account was presented in argument of the development of Dominion status within the British Empire or the British Commonwealth of Nations. Stages in that development are marked by the Imperial War Conference of 1917, the proceedings in the negotiation, the signature and the ratification of the Treaty of Versailles and of the Fisheries Treaty of 1923, by the Imperial Conferences of 1923, 1926 and 1930, and finally by the Statute of Westminster, 1931. At the moment it is sufficient to observe—as to status—that two fundamental characteristics of it are defined in unmistakable words in the Report of the Imperial Conference of 1926:

* * * we refer to the group of self-governing communities composed of Great Britain and the Dominions. Their position and mutual relations may be readily defined. They are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.

Great Britain and the Dominions (1) are united by a common allegiance to the British Crown, and (2) are “autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs. . .and freely associated as members of the British Commonwealth of Nations.”

The possession of equality of status with Great Britain in respect of all aspects of external as well as domestic affairs is thus affirmed in language admitting of no dis-

1936
REFERENCES
re
THE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.
Duff C.J.
—

1936
REFERENCES
re
THE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.

Duff C.J.

pute as to its intent or effect. This equality of status, as the report later explains, does not necessarily imply identity of function. It does, however, indisputably involve two very definite things. In the legislative sphere (subject to the disabilities imposed expressly or by necessary implication by the B.N.A. Act, and the Statute of Westminster, and to whatever restrictions may be implicit in her position as a member of the British Commonwealth of Nations owing a common allegiance to the Crown) the legislative authority reposed in the Parliament and Legislatures of Canada is plenary and embraces the whole field of external as well as domestic matters; and, in the executive sphere, while the executive authority for Canada is vested in the King, it is exercised according to the advice of the appropriate Canadian Government, and under the control of the appropriate legislature.

As regards legislative authority, this is precisely what is evidenced by the Statute of Westminster. The statute recognizes the common allegiance to the King as the bond uniting Great Britain and the Dominions. Extra-territorial legislative authority is in apt and express terms conferred upon the Dominion Parliaments. But three declarations signalize in a striking way the fundamental dogma of equality. The first is in the preamble, and is concerned with the royal style and title and the succession to the Throne. In respect of these, the preamble declares that no alteration in the law could be made consistently with the constitutional position except with the consent of all. Then there is the declaration that no statute of the United Kingdom should have effect in any Dominion as part of its law without the consent of that Dominion. And lastly, it is declared that nothing in the Act shall be deemed to give to the Parliament of Canada power to amend the B.N.A. Act. These reservations bring into relief the sweeping character of the legislative authority which is possessed by the Parliament of Canada and Legislatures combined.

As respects the executive sphere, the statute does not explicitly speak except in its recognition of the common allegiance to the Crown as the bond of union. In that field, however, the declarations of the Imperial Conferences leave

no doubt as to the constitutional position. First, as to the Governor General. In the report of 1926 his position is defined thus:

We proceeded to consider whether it was desirable formally to place on record a definition of the position held by the Governor General as His Majesty's representative in the Dominions. That position, though now generally well recognized, undoubtedly represents a development from an earlier stage when the Governor General was appointed solely on the advice of His Majesty's Ministers in London and acted also as their representative.

In our opinion it is an essential consequence of the equality of status existing among the members of the British Commonwealth of Nations that the Governor General of a Dominion is the representative of the Crown, holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain, and that he is not the representative or agent of His Majesty's Government in Great Britain or of any Department of that Government.

This declaration of 1926 is repeated in 1930:

The Report of the Inter-Imperial Relations Committee of the Imperial Conference of 1926 declared that the Governor General of a Dominion is now the

representative of the Crown, holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain, and that he is not the representative or agent of His Majesty's Government in Great Britain or of any Department of that Government.

As to the particular matter with which we are now concerned, the authority of the Government of Canada in relation to international arrangements, the Reports of the Imperial Conferences for 1923 and 1926 contain most important declarations. In substance, in so far as they are immediately pertinent, they amount to this—the Conferences recommend that the practice initiated in connection with the Halibut Fisheries Treaty of 1923 with the United States shall be continued and that, pursuant to that practice, agreements between Great Britain and a foreign country, or a Dominion and a foreign country, shall take the form of treaties between heads of states (except in the case of agreements between governments), the responsible government being in each case the Government of Great Britain or the Government of the Dominion concerned upon whose advice plenipotentiaries are appointed and full powers granted.

The argument on behalf of some of the provinces (while conceding equality of status between the Dominions and

1936
REFERENCES
re
THE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.
Duff C.J.

1936
REFERENCES
TO
THE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.

Great Britain in respect of such matters, and the political responsibility of the Dominion Government in respect of all treaties or agreements to which the Dominion is a party) denies the authority of the Governor General, acting on the advice of the Canadian Government, to conclude a treaty or an agreement with a foreign state. The prerogative, it is said, resides in the Crown and it is most earnestly contended that the power to exercise this prerogative has never been delegated to the Governor General of Canada or to any Canadian authority.

Duff C.J.

With reference to the Report of the Conference of 1926, which in explicit terms recognizes treaties in the form of agreements between governments (to which His Majesty is not, in form, a party), it is said that since an Imperial Conference possesses no legislative power, its declarations do not operate to effect changes in the law, and it is emphatically affirmed that, in point of strict law, neither the Governor General nor any other Canadian authority has received from the Crown power to exercise the prerogative.

The argument is founded on the distinction it draws between constitutional convention and legal rule; and it is necessary to examine the contention that, in point of legal rule, as distinct from constitutional convention, the Governor General in Council had no authority to become party by ratification to the convention with which we are concerned.

There are various points of view from which this contention may be considered. First of all, constitutional law consists very largely of established constitutional usages recognized by the Courts as embodying a rule of law. An Imperial Conference, it is true, possesses no legislative authority. But there could hardly be more authoritative evidence as to constitutional usage than the declarations of such a Conference. The Conference of 1926 categorically recognizes treaties in the form of agreements between governments in which His Majesty does not formally appear, and in respect of which there has been no Royal intervention. It is the practice of the Dominion to conclude with foreign countries agreements in such form, and agreements even of a still more informal character—merely by an exchange of notes. Conventions under the auspices of the Labour Organization of the League of Nations invariably are ratified by the Government of the Dominion

concerned. As a rule, the crystallization of constitutional usage into a rule of constitutional law to which the Courts will give effect is a slow process extending over a long period of time; but the Great War accelerated the pace of development in the region with which we are concerned, and it would seem that the usages to which I have referred, the practice, that is to say, under which Great Britain and the Dominions enter into agreements with foreign countries in the form of agreements between governments and of a still more informal character, must be recognized by the Courts as having the force of law.

1936
REFERENCES
re
THE WEEKLY
REST IN
INDUSTRIAL
UNDERTAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.
Duff C.J.

Indeed, agreements between the Government of Canada and other governments in the form of an agreement between Governments, to which His Majesty is not a party, have been recognized by the Judicial Committee of the Privy Council as adequate in international law to create an international obligation binding upon Canada (*Radio Reference* (1)). The Convention in question there was the Radio Telegraphic Convention of the 25th November, 1927, which was a convention between the Governments of Great Britain, Canada and other countries. The Convention was concluded "subject to ratification." The ratification was in the following form:

Whereas a Convention together with General Regulations relating to Radio Telegraphy was signed at Washington on the 25th November, 1927, by the representatives of His Majesty's Government in Canada and of other Governments specified therein, which Convention and General Regulations are word for word as follows:—

His Majesty's Government in Canada having considered the aforesaid Convention together with the General Regulations, hereby confirm and ratify the same and undertake faithfully to perform and carry out the stipulations therein contained, in witness whereof this instrument of ratification is signed and sealed by the Secretary of State for External Affairs for Canada.

Ernest Lapointe,

For the Secretary of State for External Affairs.

OTTAWA, July 12, 1928.

This ratification, it was held by the Judicial Committee of the Privy Council, was effective, and created a diplomatic obligation binding on Canada which the Parliament of Canada was competent to enforce by legislation.

1936
REFERENCES
TO
THE WEEKLY
REST IN
INDUSTRIAL
UNDERTAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.
—
Duff C.J.
—

Ratification was the effective act which gave binding force to the convention. It was, as respects Canada, the act of the Government of Canada alone, and the decision mentioned appears, therefore, to negative decisively the contention that, in point of strict law, the Government of Canada is incompetent to enter into an international engagement.

It is, however, essential in considering the question now before us not to lose sight of the fact that the ratification with which we are concerned on this reference is one professedly effected pursuant to a treaty obligation arising under the Treaty of Versailles; and some reference to the general features of that treaty, well known though they are, is unavoidable.

It is a treaty of peace. It is a treaty between the British Empire and foreign countries. *Prima facie*, therefore, by section 132 of the *British North America Act*, the Parliament and Government of Canada have "all powers necessary or proper for performing the obligations of Canada . . . as part of the British Empire, towards foreign countries arising under" the Treaty.

By the terms of article 405, upon ratification of a convention notified to Canada, Canada incurs an obligation to take such action as may be necessary to "make effective" the provisions of the convention. The question whether or not there has been ratification of the convention within the contemplation of the article will be considered later. The point to be emphasized here is that the obligation to "make effective" the provisions of the convention is a treaty obligation and, *prima facie*, therefore, an obligation in respect of which the Dominion Parliament is invested with the authority bestowed by section 132. The *Treaties of Peace Act*, 1919, 10 Geo. V, ch. 30, is in the following terms. It is convenient to reproduce the statute in full:

AN ACT for carrying into effect the Treaties of Peace between His Majesty and certain other Powers.

(Assented to 10th November, 1919).

Whereas, at Versailles, on the twenty-eighth day of June, nineteen hundred and nineteen, a Treaty of Peace (including a Protocol annexed thereto), between the Allied and Associated Powers and Germany a copy of which has been laid before each House of Parliament, was signed on behalf of His Majesty, acting for Canada, by the pleni-

potentiaries therein named; and whereas, a Treaty of Peace between the Allies and Associated Powers and Austria has since been signed on behalf of His Majesty, acting for Canada, by the plenipotentiaries therein named, and it is expedient that the Governor in Council should have power to do all such things as may be proper and expedient for giving effect to the said Treaties; Therefore His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

1. (1) The Governor in Council may make such appointments, establish such offices, make such Orders in Council, and do such things as appear to Him to be necessary for carrying out the said Treaties, and for giving effect to any of the provisions of the said Treaties.

(2) Any Order in Council made under this Act may provide for the imposition by summary process or otherwise, of penalties in respect of breaches of the provisions thereof, and shall be laid before Parliament as soon as may be after it is made, and shall have effect as if enacted in this Act, but may be varied or revoked by a subsequent Order in Council.

(3) Any expense incurred in carrying out the said Treaties shall be defrayed out of moneys provided by Parliament.

2. This Act may be cited as The Treaties of Peace Act, 1919.

The Governor in Council is, by this statute, the proper authority for authorizing ratification under article 405. The Parliament of Canada, it will be observed, consists of His Majesty the King, the Senate and the House of Commons (Section 17 B.N.A. Act); and this statute, enacted pursuant to the authority of section 132, in itself empowers the Governor General in Council to exercise any prerogative concerning foreign relations in order to carry out the stipulations of the Treaty. The Governor General acts as the delegate of His Majesty as well as the agent of Parliament. *A.G. v. Cain* (1). Moreover, section 132 itself invests the Government of Canada, as well as the Parliament of Canada, with all powers necessary or proper for performing the obligations of Canada under a treaty within the scope of that section; and the Governor General, by his Commission, is authorized and commanded to

execute * * * all things that shall belong to his said office and to the trust We have reposed in him, according to * * * such laws as are or shall hereafter be in force in Our said Dominion. (6-7 Edw. VII, p. lv).

In virtue of section 132 of the B.N.A. Act and of the *Treaties of Peace Act*, 1919, the authority of the Governor in Council to authorize ratification, therefore, would seem *prima facie* to be indisputable.

As against this conclusion, two main objections are urged. First, it is said that the legislative authority created

1936

REFERENCES
re
THE WEEKLY
REST IN
INDUSTRIAL
UNDERTAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.

Duff C.J.

1936
REFERENCES
TO
THE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.

Duff C.J.
—

by section 132 has no application to matters falling exclusively within the legislative authority of the provinces under the terms of s. 92. Second, it is said that the section is limited in its operation to matters which are properly the subjects of international arrangement, and that such matters as the regulation of the rates of wages, the hours of labour and days of rest are matters of purely domestic concern which do not fall within that category.

To deal first with the second of these objections. First of all, no authority seems to indicate that such matters are excluded from the scope of the prerogative in relation to treaties. Second, the Treaty of Versailles contains, as an integral part of it, the Covenant of the League of Nations. Art. 23 of the Covenant provides *inter alia*:

Subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the Members of the League:

(a) will endeavour to secure and maintain fair and humane conditions of labour for men, women and children, both in their own countries and in all countries to which their commercial and industrial relations extend, and for that purpose will establish and maintain the necessary international organizations;

(b) undertake to secure just treatment of the native inhabitants of territories under their control;

(c) will entrust the League with the general supervision over the execution of agreements with regard to the traffic in women and children, and the traffic in opium and other dangerous drugs;

* * *

The Treaty also includes Part 13 which provides for a permanent Labour Organization and section 1 of that Part is in these terms:

Whereas the League of Nations has for its object the establishment of universal peace, and such a peace can be established only if it is based upon social justice;

And whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required; as, for example, by the regulation of the hours of work, including the establishment of a maximum working day and week, the regulation of the labour supply, the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of his employment, the protection of children, young persons and women, provision for old age and injury, protection of the interests of workers when employed in countries other than their own, recognition of the principle of freedom of association, the organization of vocational and technical education and other measures;

Whereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries;

The High Contracting Parties, moved by sentiments of justice and humanity, as well as by the desire to secure the permanent peace of the world, agree to the following: * * *

The signatories to the Treaty included almost all the organized states of the world; and the Treaty would appear, especially in view of the parts of it just quoted, to involve a declaration by all these states that matters such as those which are the subject of the convention now in question, are proper subjects for international engagements. Since the Covenant was entered into this view has been acted upon time and again by the nations of the world and it would appear to be scarcely tenable that a treaty dealing with such matters is excluded for that reason alone from the operation of section 132.

Turning to the contention that matters ordinarily falling, as subjects of legislation, within section 92 of the B.N.A. Act are excluded from the ambit of Dominion authority under section 132, it may be said at once that such a view would run counter to well established practice as well as to judicial authority. The Dominion Parliament has, in fact, exercised the powers vested in it for performing obligations arising under such treaties by legislating in relation to matters which otherwise would have fallen within the domain of property and civil rights within the several provinces, and of controlling the management and disposal of the public lands and other property of the Provincial Governments. A signal instance is the statute of 1911 which gave statutory effect to the agreements of the International Waterways Treaty of January 11, 1909 (1911 1-2 Geo. V, ch. 28). By s. 2 of that statute,

the laws of Canada and of the several provinces thereof are hereby amended and altered so as to permit, authorize and sanction the performance of the obligations undertaken by His Majesty in and under the said treaty; and so as to sanction, confer and impose the various rights, duties and disabilities intended by the said treaty to be conferred or imposed or to exist within Canada.

It is not necessary to particularize the terms of the Treaty, but, obviously, the treaty deals with matters that, but for s. 132, would indisputably have come, at the date of the statute (1911) within the exclusive spheres of the provincial legislatures.

1936
REFERENCES
re
THE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.
Duff C.J.
—

1936
REFERENCES
re
THE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.

Duff C.J.
—

Then there is the Japanese Treaty Act (Stats. of Can. 1913, 3-4 Geo. V, ch. 27) which gave statutory effect to the treaty of the 3rd April, 1911, with Japan. By the second section, it is declared that the treaty shall have the force of law in Canada. The first four paragraphs of the first article of the Treaty are these:

The subjects of each of the High Contracting Parties shall have full liberty to enter, travel and reside in the territories of the other and, conforming themselves to the laws of the country—

1. Shall, in all that relates to travel and residence, be placed in all respects on the same footing as native subjects.

2. They shall have the right, equally with native subjects, to carry on their commerce and manufacture, and to trade in all kinds of merchandise of lawful commerce, either in person or by agents singly or in partnerships with foreigners or native subjects.

3. They shall in all that relates to the pursuit of their industries, callings, professions, and educational studies be placed in all respects on the same footing as the subjects or citizens of the most favoured nation.

4. They shall be permitted to own or hire and occupy houses, manufactories, warehouses, shops, and premises which may be necessary for them, and to lease land for residential, commercial, industrial and other lawful purposes, in the same manner as native subjects.

In 1921, by ch. 49 of the statutes of that year, the legislature of British Columbia passed a statute giving legislative force to certain Orders in Council intended to put into effect a resolution of the legislature of 1902 by which it was resolved

that in all contracts, leases and concessions of whatsoever kind entered into, issued, or made by the government, or on behalf of the government, provision be made that no Chinese or Japanese shall be employed in connection therewith.

This statute of 1921 was challenged in respect of the competence of the legislature to enact it, and it came before the Judicial Committee in two cases,—*Brooks-Bidlake v. A.G. for B.C.* (1) and *A.G. for B.C. v. A.G. for Canada* (2). By the decision in the first of these cases, it was held that, as respects Chinese, the statute was valid as an exercise of the functions of the provincial legislature under sec. 92(5) and sec. 109 of the B.N.A. Act in regulating the management of the property of the province, and in determining whether a grantee or licensee of that property should or should not employ persons of certain races; and that its validity was not affected by the circumstance that exclusive legislative authority respecting naturaliza-

tion and aliens is vested in the Parliament of Canada by head no. 25 of section 91.

The legislation being valid as regards Chinese, as an exercise of the legislative authority of the province under sections 92 and 109, it was held in the second of the above mentioned decisions to be invalid as regards Japanese, that is to say, the subjects of the Emperor of Japan, because it conflicted with the Japanese Treaty Act. In the absence of the Japanese Treaty and the statute giving it the force of law throughout Canada, the legislation would have been operative in respect of Japanese as well as Chinese, but the powers of the Dominion under section 132, were held to be sufficient to enable the Dominion to lay down a rule, in conformity with its obligations under the Japanese Treaty, which the provincial legislature thereby became incompetent to infringe or disregard by the exercise of powers which otherwise it would undoubtedly have possessed under the sections mentioned of the Confederation statute.

The scope and effect of section 132 came again before the Judicial Committee of the Privy Council for consideration in two cases in the year 1932: first, the *Aeronautics* case (1), and, second, the *Radio* case (2). Each of these cases arose out of a reference to this Court, by the Governor General in Council.

In the first case, the first question submitted was as follows:

Have the Parliament and Government of Canada exclusive legislative and executive authority for performing the obligations of Canada, or of any Province thereof, under the Convention entitled "Convention relating to the Regulation of Aerial Navigation?"

That question was unanimously answered in this Court in the negative. The Judicial Committee answered it in the affirmative; and the parts of their Lordships' judgment which specially relate to that interrogatory are in these words:

There may also be cases where the Dominion is entitled to speak for the whole, and this not because of any judicial interpretation of ss. 91 and 92, but by reason of the plain terms of s. 132, where Canada as a whole, having undertaken an obligation, is given the power necessary and proper for performing that obligation.

* * *

(1) [1932] A.C. 54.

(2) [1932] A.C. 304.

1936
REFERENCES
72
THE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT.
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.
Duff C.J.

1936
REFERENCES
re
THE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.
Duff C.J.

In their Lordships' view, transport as a subject is dealt with in certain branches both of s. 91 and of s. 92, but neither of those sections deals specially with that branch of transport which is concerned with aeronautics.

Their Lordships are of opinion that it is proper to take a broader view of the matter rather than to rely on forced analogies or piecemeal analysis. They consider the governing section to be s. 132, which gives to the Parliament and Government of Canada all powers necessary or proper for performing the obligations towards foreign countries arising under treaties between the Empire and such foreign countries. As far as s. 132 is concerned, their Lordships are not aware of any decided case which is of assistance on the present occasion. It will be observed, however, from the very definite words of the section, that it is the Parliament and Government of Canada who are to have all powers necessary or proper for performing the obligations of Canada, or any Province thereof. It would therefore appear to follow that any Convention of the character under discussion necessitates Dominion legislation in order that it may be carried out. It is only necessary to look at the Convention itself to see what wide powers are necessary for performing the obligations arising thereunder.

* * *

It is therefore obvious that the Dominion Parliament, in order duly and fully to "perform the obligations of Canada or of any Province thereof" under the Convention, must make provision for a great variety of subjects. Indeed, the terms of the Convention include almost every conceivable matter relating to aerial navigation, and we think that the Dominion Parliament not only has the right, but also the obligation, to provide by statute and by regulation that the terms of the Convention shall be duly carried out. With regard to some of them, no doubt, it would appear to be clear that the Dominion has power to legislate, for example, under s. 91, item 2, for the regulation of trade and commerce, and under item 5 for the postal services, but it is not necessary for the Dominion to piece together its powers under s. 91 in an endeavour to render them co-extensive with its duty under the Convention when s. 132 confers upon it full power to do all that is legislatively necessary for the purpose (1).

In the second of these cases, the *Radio* case (2), Lord Dunedin, speaking for the Board, observed, with reference to the *Aeronautics* case (3).

For this must at once be admitted, the leading consideration in the judgment of the Board was that the subject fell within the provisions of s. 132 of the *British North America Act*. * * *

The tenor of these observations is hardly compatible with the notion that the authority to legislate under s. 132 does not apply to matters which, but for that section, would have fallen within the exclusive legislative jurisdiction of the provinces under other enactments of the B.N.A. Act. The power to legislate for the perform-

(1) [1932] A.C. 54, at 73, 74, 76, 77. (2) [1932] A.C. 304.

(3) [1932] A.C. 304, at 311.

ance of obligations under treaties within that section is reposed exclusively in the Dominion Parliament, their Lordships declare, and, as their Lordships imply, the language is general and the power in no way depends upon the condition that the matters with which the obligation is concerned shall be matters in respect of which Parliament is invested with jurisdiction under section 91 or any other section of the B.N.A. Act. This view of these observations is confirmed by a perusal of the judgment of Lord Dunedin, delivered on behalf of the Judicial Committee in the *Radio* case (1) the second of the cases above mentioned. Beginning at p. 311 (2), he says:—

1936
REFERENCES
re
THE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.
Duff C.J.

For this must at once be admitted; the leading consideration in the judgment of the Board was that the subject fell within the provisions of s. 132 of the British North America Act, 1867, which is as follows:

The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any Province thereof as part of the British Empire towards foreign countries arising under treaties between the Empire and such foreign countries.

And it is said with truth that, while as regards aviation there was a treaty, the convention here is not a treaty between the Empire as such and foreign countries, for Great Britain does not sign as representing the Colonies and Dominions. She only confirms the assent which had been signified by the Colonies and Dominions who were separately represented at the meetings which drafted the convention. But while this is so, the aviation case in their Lordships' judgment cannot be put on one side.

Counsel for the Province felt this and sought to avoid any general deduction by admitting that many of the things provided by the convention and the regulations thereof fell within various special heads of s. 91. For example, provisions as to beacon signals he would refer to head 10 of s. 91—navigation and shipping. It is unnecessary to multiply instances, because the real point to be considered is this manner of dealing with the subject. In other words, the argument of the Province comes to this: Go through all the stipulations of the convention and each one you can pick out which fairly falls within one of the enumerated heads of s. 91, that can be held to be appropriate for Dominion legislation; but the residue belongs to the Province under the head either of head 13 of s. 92—property and civil rights, or head 16—matters of a merely local or private nature in the Province.

Their Lordships cannot agree that the matter should be so dealt with. Canada as a Dominion is one of the signatories to the convention. In a question with foreign powers the persons who might infringe some of the stipulations in the convention would not be the Dominion of Canada as a whole but would be individual persons residing in Canada. These persons must so to speak be kept in order by legislation and the only legislation that can deal with them all at once is Dominion legislation. This idea of Canada as a Dominion being bound by a convention equivalent

(1) [1932] A.C. 304.

(2) [1932] A.C. 304, at 311.

1936

REFERENCES

THE WEEKLY
 REST IN
 INDUSTRIAL
 UNDER-
 TAKINGS ACT,
 THE
 MINIMUM
 WAGES ACT,
 AND THE
 LIMITATION
 OF HOURS OF
 WORK ACT.

 Duff C.J.

to a treaty with foreign powers was quite unthought of in 1867. It is the outcome of the gradual development of the position of Canada vis-à-vis to the mother country, Great Britain, which is found in these later days expressed in the Statute of Westminster. It is not, therefore, to be expected that such a matter should be dealt with in explicit words in either s. 91 or 92. The only class of treaty which would bind Canada was thought of as a treaty by Great Britain, and that was provided for by s. 132. Being, therefore, not mentioned explicitly in either s. 91 or s. 92, such legislation falls within the general words at the opening of s. 91 which assign to the Government of the Dominion the power to make laws "for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the Provinces." In fine, though agreeing that the Convention was not such a treaty as is defined in s. 132, their Lordships think that it comes to the same thing.

* * *

The result is in their Lordships' opinion clear. It is Canada as a whole which is amenable to the other powers for the proper carrying out of the convention; and to prevent individuals in Canada infringing the stipulations of the convention it is necessary that the Dominion should pass legislation which should apply to all the dwellers in Canada.

His Lordship proceeds to observe that the view expounded in this passage "is destructive of the view urged by the province as to how the observance of the international convention should be secured."

It seems hardly open to dispute that their Lordships intended to lay down that international obligations, which are strictly treaty obligations within the scope of s. 132, as well as obligations under conventions between governments not falling within s. 132, are matters which, as subjects of legislation, cannot fall within s. 92 and, therefore, must fall within s. 91; and since they do not fall within any of the enumerated subjects of section 91, they are within the ambit of the Dominion power to make laws for the peace, order and good government of Canada. That seems to be the effect of what is said, because, at pp. 311 and 312, their Lordships dealt with the contention, advanced on behalf of the provinces, that legislative authority to deal with and give effect to the convention is vested, as regards matters falling within the enumerated heads of s. 91, in the Dominion Parliament; but that, as regards matters which would normally fall within s. 92, such authority is vested in the provincial legislatures. The contention is rejected, and rejected for the reasons given in the passage quoted, viz., that such matters, as the subjects of an international convention, are matters which

concern the Dominion as a whole and, therefore, exclusively within the competence of the Dominion Parliament.

1936
REFERENCES
re
THE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.

It is, at this point, important to emphasize these two things: First, that by the combined effect of the judgments in the *Aeronautics* case (1) and the *Radio* case (2), the jurisdiction of the Dominion Parliament in relation to international obligations is exclusive; and, moreover, as such matters are embraced within the authority of Parliament in relation to peace, order and good government, its power is plenary.

Duff C.J.

It was at one time supposed that s. 132 was the sole source of authority for Parliament in respect of the enforcement of international obligations, as regards matters which, otherwise, would fall within s. 92, and, at the same time, would not fall within any of the enumerated heads of section 91: that, for the purpose of ascertaining the ambit of that authority, one must look to the scope of s. 132 (and the conditions under which that section operates): and that from the language employed it was a legitimate inference that the jurisdiction did not arise until there was a treaty obligation in existence within the contemplation of the section. Four of the judges of this Court who took part in the judgment in the *Aeronautics* case (3) expressed that view.

Moreover, it was supposed that, as regards matters normally falling within s. 92, the provinces might legislate for the purpose of giving effect to an international obligation. In the *Aeronautics* case (1), the members of this Court were unanimously of the opinion that, as regards such matters, the jurisdiction of the Parliament of Canada was not exclusive, even though paramount.

It is now plain (as a result of these two decisions of 1932) that the provinces have no jurisdiction to legislate for the performance of such obligations, whether they be obligations within s. 132 or whether they be outside that section and within the scope of the general power to make laws for the peace, order and good government of Canada. Such obligations, we repeat, it is now settled, are not

(1) [1932] A.C. 54.

(2) [1932] A.C. 304.

1936

REFERENCES

re
 THE WEEKLY
 REST IN
 INDUSTRIAL
 UNDER-
 TAKINGS ACT,
 THE
 MINIMUM
 WAGES ACT,
 AND THE
 LIMITATION
 OF HOURS OF
 WORK ACT.

Duff C.J.

matters within the subjects of s. 92 or the enumerated subjects of s. 91.

It has been contended in respect of Dominion jurisdiction in relation to international matters, under section 132, as well as under the residuary clause (as pointed out in the judgment of Duff J. on the Reference relating to the employment of aliens (Japanese Treaty, 63 S.C.R. 330)) that there are certain fundamental terms of the arrangement upon which the B.N.A. Act was framed which it is difficult to suppose Parliament could in any case disregard; and that it is a necessary inference to be drawn from the B.N.A. Act as a whole as regards such terms that the Dominion cannot, without, at all events, the assistance of the Provinces, legislate in contravention of them, even in the exercise of its authority over international relations. It is not necessary to deal with this contention; it is sufficient to say that the statutes under discussion do not deal with matters excluded from Dominion jurisdiction by any such principle.

We now turn to a consideration of article 405 and, before discussing the text of that article, it may be desirable to recall what has been said with regard to the scope of legislative authority vested in the Parliament of Canada and the legislatures of the provinces combined. Subject to the reservations mentioned, the ambit of that legislative authority would appear to embrace any action of the Government of Canada in entering into international arrangements either directly, by way of agreements between governments or otherwise without the intervention of His Majesty, or, in the case of treaties between heads of states, by plenipotentiaries appointed by His Majesty on the advice of the Canadian Government; and, generally speaking, the conduct of external affairs by that Government. As regards all such international arrangements, it is a necessary consequence of the respective positions of the Dominion executive and the provincial executives that this authority resides in the Parliament of Canada. The Lieutenant-Governors represent the Crown for certain purposes. But, in no respect does the Lieutenant-Governor of a province represent the Crown in respect of relations with foreign governments. The Canadian executive, again, con-

stitutionally acts under responsibility to the Parliament of Canada and it is that Parliament alone which can constitutionally control its conduct of external affairs.

As the subject of agreements with foreign countries is not one of the subjects embraced within section 92, or within any of the enumerated heads of section 91, it follows that the authority must rest upon the residuary clause from which Parliament derives its power to make laws for the peace, order and good government of Canada; and it follows from what has already been said that this power is plenary. It is for the Parliament of Canada to determine the conditions upon which such agreements shall be entered into as well as the manner in which they shall be performed and this may be done by antecedent legislation or by legislation taking effect *ex post facto*. These propositions are, indeed, corollaries of the proposition that the power is plenary.

As regards League of Nations matters, the following passage from the last edition of Anson's Law and Customs of the Constitution seems to state the position accurately:

(1) In all League of Nations matters each of the Dominions (except Newfoundland) is quite independent of the United Kingdom. Its representatives at the League Assembly are not accredited by the King on the advice of the Secretary of State for Foreign Affairs, but by the Governor General on the advice of his ministers, and they act independently of the British Empire or other Dominion delegates; consultation is, of course, possible but is by no means necessary. Moreover, the Dominions are eligible for seats on the Council, despite the permanent representation thereon of the British Empire in which the Dominions are included. Canada was elected to membership in 1927, then the Irish Free State in 1930, and the Commonwealth in 1933.

(2) The Dominions are in like manner autonomous in relation to the Labour Organization of the League. Further, conventions arrived at under its auspices are ratified by Order of the Governor General in Council, not by the King, on the advice of the Secretary of State. (pp. 87, 88.)

As regards all these matters, it has never been doubted that it is the executive of Canada which represents Canada or that the executive is entirely under the control of Parliament.

The draft convention now in question was, as we have seen, brought before the House of Commons and the Senate, received the assent of both Houses in the form of resolutions, which resolutions approved the ratification of it, and the legislation now in question was passed for the

1936

REFERENCES

re

THE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.

Duff C.J.

1936

REFERENCES

^{re}
THE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.

Duff C.J.

purpose of giving legislative effect to the stipulations, the operative clauses of the statute being preceded by a preamble in which it was recited that the draft convention has been ratified by Canada. The propriety of this procedure is questioned on the ground that, under the special provisions of art. 405, and especially those of paragraphs 5 and 7 of the article, the draft conventions should have been submitted to the provincial legislatures.

There can, of course, in view of what has been said, be no dispute that the procedure followed, if we put aside the provisions of art. 405, was the usual and the proper procedure for entering into agreements with foreign governments. The Governor General in Council is exclusively invested with the executive authority to assent to an agreement, in the form of an agreement between Governments, with the Government of a foreign state. The Parliament of Canada is the legislative body that is exclusively invested with authority to legislate in respect of the creation of obligations through the instrumentality of such agreements. It is the legislative body exclusively invested with power to legislate for giving effect to such obligations. The course of the proceedings, prior to ratification, in which the convention was approved by resolutions of the Senate and the House of Commons respectively, was in accord with the settled general practice of the Canadian Parliament in the ratification of such agreements; and the statute which, in its preamble, declares that the convention has been ratified by Canada, in itself, would constitute sanction by legislative act of that ratification. Executive and legislative authority combined, each playing its appropriate part, according to the usual procedure, in the creation of the obligation and in the enactment of legislation to give effect to it.

On behalf of the provinces it is said that, granting all this, these proceedings are nevertheless affected with invalidity because they do not conform to the procedure prescribed in article 405 which requires the draft convention, antecedently to ratification, to be brought before

the authority or authorities within whose competence the matter lies for enactment of legislation or other action;

and, therefore, it is argued, requires that, in the application of the article to Canada, the competent authorities to

which the draft convention must be submitted include the provincial legislatures.

Paragraphs 5 and 7 of article 405 are in these words:

Each of the Members undertakes that it will, within the period of one year at most from the closing of the session of the Conference, or if it is impossible owing to exceptional circumstances to do so within the period of one year, then at the earliest practicable moment and in no case later than eighteen months from the closing of the session of the Conference, bring the recommendation or draft convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action.

* * *

In the case of a draft convention the Member will, if it obtains the consent of the authority or authorities within whose competence the matter lies, communicate the formal ratification of the convention to the Secretary-General and will take such action as may be necessary to make effective the provisions of such convention.

In considering the contention of the provinces that the competent authorities within the intendment of these paragraphs include the provincial legislatures, it is necessary that the paragraphs be read together. The "Competence" postulated is to enact legislation or to take other "action" contemplated by the article.

The seventh paragraph imposes upon members two conditional obligations; an obligation, upon the consent of the competent authority or authorities, to ratify; and an obligation, upon the like consent after ratification, "to make effective the provisions of (the) convention" within their territorial jurisdiction. Both these obligations are treaty obligations and the "action," legislative or other, by the competent "authority or authorities" which is contemplated by paragraph 5 would seem clearly to include the second of these obligations, if not both of them.

As concerns the second obligation, the answer to the question, What is the constitutional agency responsible for discharging it? would appear to be dictated by section 132 which is once again quoted verbatim:

132. The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any Province thereof, as part of the British Empire, towards Foreign Countries arising under Treaties between the Empire and such foreign countries.

The power to perform the obligations of the Treaty to make the provisions of the convention effective, in so far as it requires legislative action, is by this section vested

1936
REFERENCES
re
THE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.

Duff C.J.

1936
REFERENCES
re
THE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.
Duff C.J.

primarily in the Parliament of Canada. In so far as it requires executive action, it is vested in the Government of Canada. The judgments of the Judicial Committee of the Privy Council in the *Aeronautics* case (1) and the *Radio* case (2) constrain us to hold that jurisdiction to legislate for the purpose of performing the obligation—for bringing the law of the Canadian provinces into harmony with the provisions of the convention, for example—resides exclusively in the Parliament of Canada; and, by parity of reasoning, if not, indeed, as an obvious logical consequence of that proposition, jurisdiction resides, in so far as executive action is required, exclusively in the Government of Canada.

There can be no possible doubt, therefore, that the Parliament of Canada is at least one of the authorities before which the draft convention must be brought in the performance of the duty imposed upon Canada by paragraph 5. The question whether, by force of the *Treaties of Peace Act*, 1919, the Governor General in Council is empowered to act as the agent of Parliament in this respect was not discussed and is of no importance, since the assent of both Houses of Parliament and of the Governor General in Council was admittedly given.

The question remains: Are the provincial legislatures also comprehended under the phrase “authority or authorities within whose competence the matter lies, for the enactment of legislation or other action?”

At one time we thought that, since by s. 92 the jurisdiction, speaking generally, to legislate in relation to the subjects dealt with by the draft convention would, in the absence of any international agreement and of legislation by the Parliament of Canada under s. 132, fall within the exclusive legislative jurisdiction of the provinces, the provincial legislatures might fairly be said to be included within this description. But we have been forced to the conclusion above expressed that the “legislation or other action” contemplated by paragraph 5 is “action” concerning making “effective the provisions of the convention,” and, perhaps, also, action concerning ratification. That seems to me to be the plain reading of this article; and

where you have authorities (the Parliament and Government of Canada) which are exclusively invested with the power to take legislative and executive measures for the performance of international obligations, we can see no escape from the conclusion that such are the authorities designated by these paragraphs.

We were at one time much influenced by the consideration of the importance of obtaining the assent of the provincial legislatures, which would naturally be more conversant with the conditions prevailing in their respective provinces and more capable of estimating the difficulties of giving effect to a given convention therein than the Parliament of Canada could be expected to be; but such considerations, we have been forced to conclude, cannot justify a refusal to give effect to what seems to be the true construction of this article.

Upon the true construction, the provincial legislatures, it seems to me, after a prolonged examination of the question in all its bearings, are not authorities competent to enact legislation or to take executive action for the purposes contemplated by paragraph 5; that is to say, either for making "effective the provisions of the convention," or for ratification.

It will appear, however, from the observations which immediately follow that it is strictly not necessary to decide the question we have just dealt with. My view as to the validity of the legislation can be rested upon another ground.

Mr. Rowell contends as follows:

General authority to bind Canada by adherence to an international convention containing the substance of the stipulations of that in question is vested in the Government of Canada, and a general authority to legislate for giving effect to any obligation arising from such adherence is vested in the Parliament of Canada: the Parliament of Canada, moreover, is the legislative body which has power to legislate for Canada in relation to the creation, as well as the enforcement, of international obligations: ratification of a convention, therefore, it is argued, which has been authorized by the Government of Canada with the assent of the Houses of Parliament, and in respect of which

1936
REFERENCES
re
THE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.
Duff C.J.
—

1936
REFERENCES
^{re}
THE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.

Duff C.J.
—

legislation has been enacted recognizing the ratification and providing for the enforcement of the stipulations of the convention, is one which is diplomatically binding on Canada.

The duty of the member, Canada, under art. 405, to submit the draft convention to the competent authorities is a duty committed to the Government of Canada. It is committed to the Government of Canada by the *Treaties of Peace Act*, 1919, a statute indisputably within the jurisdiction of the Dominion under s. 132 of the B.N.A. Act. By that statute, the Governor General in Council, as we have seen, is entrusted with the performance of that duty. It is the same authority (the Governor General in Council) who is also entrusted, by force of the same statute, with the duty of ratifying the draft convention upon the assent of the competent authorities. Ratification by the Governor General in Council would seem to imply a representation that the conditions of the authority to ratify have been fulfilled.

By the *Treaties of Peace Act*, 1919, Parliament, that is to say, the King in Parliament, imposed upon the Governor General in Council the responsibility of passing such Orders in Council and doing such acts as to him might appear necessary for carrying out and giving effect to the provisions of the Treaty. Moreover, the statute now under consideration expressly by its preamble declares that the convention has been ratified by Canada. The Governor in Council, in authorizing the ratification, spoke as the agent of Parliament as well as the representative of His Majesty the King. The ratification was accepted by Parliament as a ratification binding upon His Majesty for Canada. It has all the force, therefore, of a ratification authorized by the King in Parliament. Considering the sweeping character of the legislative authority reposed in Parliament and the legislatures combined, and the scope of the powers which consequently devolve upon Parliament in respect of matters outside the provincial sphere (which matters include the creation as well as the enforcement of international obligations), it would seem that Canada could not be more solemnly committed as to the validity of the ratification in question as a ratification under art. 405.

Some reference is necessary to the answers given to the interrogatories addressed to this Court in 1925 on a reference in relation to one of the conventions now under consideration—the convention relating to Hours of Labour (1). We do not enter upon a systematic examination of that decision. The view expressed in the preceding pages as to the effect of the judgments of the Judicial Committee (2) (3) and its bearing upon the construction of article 405 require us to consider afresh the question of the “competence” of the provincial legislatures in so far as it is relevant within the meaning of art. 405 in the light of those decisions. We have already expressed the view that, in effect, they negative the “competence” of the provincial legislatures in the pertinent sense. The view expressed in the last preceding paragraph is, obviously, of course, not affected by what was decided in 1925.

1936
REFERENCES
TO
THE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.
Duff C.J.
—

The result is that “*The Minimum Wages Act*” is valid.

In substance, the foregoing reasoning govern the decision as to the answers to the interrogatories touching the validity of the statutes relating to *Weekly Rest in Industrial Undertakings* and the *Limitation of Hours of Work*, which are, therefore, also valid.

To summarize:—

From two main considerations, the conclusion follows that legislative authority in respect of international agreements is, as regards Canada, vested exclusively in the Parliament of Canada.

First, by virtue of section 132 of the *British North America Act*, jurisdiction, legislative and executive, for the purpose of giving effect to any treaty obligation imposed upon Canada, or any one of the provinces of Canada, by force of a treaty between the British Empire and a foreign country, is committed to the Parliament and Government of Canada. This jurisdiction of the Dominion, the Privy Council held, in the *Aeronautics* case (2) and in the *Radio* case (3) is exclusive; and consequently, under the *British North America Act*, the provinces have no power and never had power to legislate for the purpose

(1) [1925] S.C.R. 505.

(2) [1932] A.C. 54.

(3) [1932] A.C. 304.

1936
REFERENCES
re
THE WEEKLY
REST IN
INDUSTRIAL
UNDERTAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.

Duff C.J.

of giving effect to an international agreement: that, as a subject of legislation, is excluded from the jurisdiction envisaged by section 92.

Second, as a result of the constitutional development of the last thirty years (and more particularly of the last twenty years) Canada has acquired the status of an international unit, that is to say, she has been recognized by His Majesty the King, by the other nations of the British Commonwealth of Nations, and by the nations of the world, as possessing a status enabling her to enter into, on her own behalf, international arrangements, and to incur obligations under such arrangements. These arrangements may take various forms. They may take the form of treaties, in the strict sense, between heads of states, to which His Majesty the King is formally a party. They may take, *inter alia*, the form of agreements between governments, in which His Majesty does not formally appear, Canada being represented by the Governor General in Council or by a delegate or delegates authorized directly by him. Whatever the form of the agreement, it is now settled that, as regards Canada, it is the Canadian Government acting on its own responsibility to the Parliament of Canada which deals with the matter. If the international contract is in the form of a treaty between heads of states, His Majesty acts, as regards Canada, on the advice of his Canadian Government.

Necessarily, in virtue of the fundamental principles of our constitution, the Canadian Government in exercising these functions is under the control of Parliament. Parliament has full power by legislation to determine the conditions under which international agreements may be entered into and to provide for giving effect to them. That this authority is exclusive would seem to follow inevitably from the circumstances that the Lieutenant-Governors of the provinces do not in any manner represent His Majesty in external affairs, and that the provincial governments are not concerned with such affairs: the effect of the two decisions reported in 1932 Appeal Cases is that in all these matters the authority of Parliament is not merely paramount, but exclusive.

The first of the two cardinal questions raised by the contentions of the provinces has two branches, and may be stated thus: Has Parliament authority to legislate for carrying out a treaty or convention or agreement with a foreign country containing stipulations to which effect can only be given by domestic legislation changing the law of the provinces (a) in matters committed by the *British North America Act* (in the absence of any such international agreement) to the legislatures of the provinces exclusively, and (b) in relation to such matters where they are *ex facie* of domestic concern only and not of international concern, such, for example (as the provinces argue), as the matters dealt with by the conventions to which effect is given by the statutes now before us: the regulation of wages and of hours of labour.

1936
REFERENCES
re
THE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.
Duff C.J.

The claim of Parliament to authority to execute legislative changes in the law of the provinces in such matters naturally arouses concern and misgiving among the authorities charged with responsibility touching the status and rights of the provinces.

The view that the exclusive authority of Parliament extends to international treaties and agreements relating to such subjects rests on the grounds now outlined.

(1) As touching the view advanced that the subject matters of the stipulations in the international agreements in question are of exclusively domestic and not at all of international concern: the language of section 132 is unqualified and that section would appear *prima facie* to extend to any treaty with a foreign country in relation to any subject matter which in contemplation of the rules of constitutional law respecting the royal prerogative concerning treaties would be a legitimate subject matter for a treaty; and there would appear to be no authority for the proposition that treaties in relation to subjects, such as the subject matter of the statutes in question are not within the scope of that prerogative. The question whether the language of section 132 is, by necessary implication, subject to some restriction in order to preserve unimpaired radical guarantees evidenced by the B.N.A. Act as a whole is mentioned in the next succeeding paragraph. Legislative authority to give effect to treaties within section 132

1936
REFERENCES
re
THE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.

Duff C.J.

remained, of course, after the B.N.A. Act, down to the enactment of the Statute of Westminster, in the Imperial Parliament, although by section 132, it also became and is vested in the Parliament of Canada; but, since the Statute of Westminster, no Act of the Imperial Parliament can have effect in Canada without the consent of Canada. The practice of modern times and, in particular, the provisions of the Covenant of the League of Nations embodied in the Treaty of Versailles would appear to demonstrate that by common consent of the nations of the world, such matters are regarded as of high international as well as of domestic concern and proper subjects for treaty stipulation.

(2) As touching the view that the legislative authority committed to the Parliament and Government of Canada by section 132 (and by the introductory clause of section 91 in relation to international matters) does not extend to matters which would fall exclusively within the legislative jurisdiction of the provinces, in the absence of any international obligation respecting them, it is to be observed: First, section 132 relates *inter alia* to obligations imposed upon any province of Canada by any treaty between the British Empire and a foreign country. Section 132 obviously contemplates the possibility of such an obligation arising as a diplomatic obligation under such a treaty, even although legislation might be necessary in order to attach to it the force of law. In such case, the Parliament and Government of Canada appear to be endowed with the necessary legislative and executive powers. This provision with regard to the obligations of the provinces taken together with the generality of the language employed in section 132 would seem to point rather definitely to the conclusion that the view under consideration is not tenable;

Secondly, the established practice of the Parliament of Canada and the decisions of the Courts in relation to that practice do not accord with this view. Statutes giving effect to the International Waterways Treaty (1911) with the United States, and the Treaty with Japan (1913) are instances in which treaties dealing with matters of civil right within the provinces and the management of the public property of the provinces were given the force of law by Dominion statutes. The legislation concerning

the Japanese Treaty was held to be valid and to nullify a statute of the Province inconsistent with it by the Judicial Committee of the Privy Council in *Attorney-General for British Columbia v. Attorney-General for Canada* (1).

The jurisdiction of Parliament to enforce international obligations under agreements which are not strictly "treaties" within section 132 is co-ordinate with the jurisdiction under this last named section.

It is contended by the Provinces that the Dominion cannot by reason merely of the existence of an international agreement (within section 132 or within the residuary clause) possess legislative authority enabling the Parliament of Canada to legislate in derogation of certain fundamental terms which, it is said, were the basis of the Union of 1867, and are expressly or impliedly embodied in the B.N.A. Act. For the purposes of the present reference, it is unnecessary to make any observation upon this contention further than what has already been said, viz., that the exclusive authority of the Dominion to give the force of law to an international agreement is not affected by the circumstances alone that, in the absence of such an agreement, the exclusive legislative authority of the provinces would extend to the subject matter of it.

The second of the cardinal questions requiring determination concerns the construction and effect of article 405 of the Treaty of Versailles.

The draft conventions now in question were brought before the House of Commons and the Senate, received the assent of both Houses in the form of resolutions, which resolutions approved the ratification of them, and the statutes in question were passed for the purpose of giving legislative effect to their stipulations, the operative clauses of the statute being in each case preceded by a preamble in which it is recited that the draft conventions have been ratified by Canada. The procedure followed, if we put aside the provisions of article 405, was the usual and proper procedure for engaging in and giving effect to agreements with foreign governments. The propriety of this procedure is questioned on the ground that under the special provisions of article 405, and especially those of paragraphs

1936
REFERENCES
re
THE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.
Duff C.J.

1936
REFERENCES
re
THE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.

Duff C.J.

5 and 7 of the article, it was an essential condition of the jurisdiction of Parliament to legislate for the enforcement of the conventions that the conventions should have been submitted to, and should have received the assent of, the provincial legislatures before the enactment of such legislation by Parliament. Paragraphs 5 and 7 are as follows:

Each of the Members undertakes that it will, within the period of one year at most from the closing of the session of the Conference or if it is impossible owing to exceptional circumstances to do so within the period of one year, then at the earliest practicable moment and in no case later than eighteen months from the closing of the session of the Conference, bring the recommendation or draft convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action.

* * *

In the case of a draft convention, the Member will, if it obtains the consent of the authority or authorities within whose competence the matter lies, communicate the formal ratification of the convention to the Secretary-General and will take such action as may be necessary to make effective the provisions of such convention.

These paragraphs must be read together and, reading them together, it would appear that the "competence" postulated is the "competence" to enact legislation or to take other "action" contemplated by the article.

The obligations upon consent of the competent authority or authorities to ratify and, upon like consent after ratification, "to make effective the provisions of the convention" are both treaty obligations; and the authority or authorities competent to take legislative action where legislative action may be necessary to make the provisions of the convention effective would appear plainly to be included within the authority or authorities before whom it is provided that the draft conventions shall be brought.

It follows from what has been said that this treaty obligation is an obligation within section 132 and, consequently, that the authority to make the convention effective exclusively rests in the Parliament and Government of Canada and, therefore, that the Parliament of Canada is, at least, one of the authorities before which the convention must be brought under the terms of article 405. The question whether the provincial legislatures are also competent authorities within the contemplation of paragraph 5 would appear to be necessarily determined by the consideration that we are constrained by the decisions of the Judicial

Committee of the Privy Council (1), already referred to, to hold that the authority of Parliament in this matter is exclusive and that the provincial legislatures are not competent to legislate for giving effect to the provisions of any international convention. * * * Strictly, however, important as this question of the "competence" of the provincial legislatures in the sense of article 405 is, it is unnecessary to decide it for the purposes of this reference; as will appear from what immediately follows.

The Governor General in Council is designated by the *Treaties of Peace Act*, 1919, enacted under the authority of section 132, to take all such measures as may seem to him to be necessary for the purpose of carrying out the *Treaties of Peace* and for giving effect to the terms of such treaties. He it was, therefore, upon whom devolved the duty of performing the obligation of Canada under art. 405 to bring the draft conventions before the authority or authorities possessing "competence" under the Constitution of Canada. He it was also on whom devolved the duty to communicate to the League of Nations the ratification by Canada upon the assent of the competent authority or authorities. Moreover, the Parliament of Canada, as we have seen, possessing exclusive jurisdiction in relation to international agreements, the creation as well as the enforcement of them, declared, by the statutes now under examination, that the conventions in question were ratified by Canada. The executive authority, therefore, charged with the duty of acting for Canada in performing the treaty obligations of submitting the conventions to the proper constitutional authorities and of communicating ratification to the League of Nations upon the assent of those authorities, and His Majesty the King in Parliament have, in effect, combined in declaring that the ratification was assented to by the proper constitutional authorities of Canada in conformity with the stipulations of article 405.

That would appear to be sufficient to constitute a diplomatic obligation binding upon Canada to observe the provisions of the conventions.

The answer to the three interrogatories addressed to this Court under this Order of Reference is, therefore, the statutes being *intra vires* in each case, in the negative.

1936

REFERENCES
TO
THE WEEKLY
REST IN
INDUSTRIAL
UNDERTAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.

Duff C.J.

1936
REFERENCES
^{re}
THE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.

Rinfret J.
—

RINFRET, J.—For the purpose of giving answers to the questions referred to the Court by His Excellency the Governor General in Council concerning *The Weekly Rest in Industrial Undertakings Act*, *The Minimum Wages Act* and *The Limitation of Hours Act*, it is well to bear in mind that, apart from any consideration resulting from their aspect as laws intended to carry out the obligations of Canada under Draft Conventions agreed upon at general conferences of the International Labour Office of the League of Nations, the subject-matter of these legislations is undoubtedly one in relation to which, under the Constitution of our Country, the legislature in each province may exclusively make laws.

It follows that, in order to support the validity of the Acts, the Attorney-General of Canada had the burden of demonstrating that, in the premises, the subject-matter of the disputed legislation had, for some special reason, been transferred to the jurisdiction of the Parliament of Canada.

The written submission of the Attorney-General of Canada, as it was made to this Court, was that the Acts were within the legislative power of the Parliament of Canada in their entirety in virtue of

(1) its exclusive legislative power under sec. 132 of the *British North America Act*;

(2) its general power, conferred by sec. 91 of the said Act, to perform the obligations of Canada under the several draft conventions duly ratified by Canada as a Member of the International Labour Organization;

(3) its general power to make laws for the peace, order and good government of Canada;

(4) its exclusive legislative authority in relation to the regulation of trade and commerce;

(5) its exclusive legislative authority in relation to the criminal law.

It will only be necessary to consider the provisions contained in numbers 1 and 2 of the submission, for it seems to be evident that the subject-matter of the Acts is not criminal law (and the point was not pressed at the argument).

As for the contention that the legislation may be supported as an exercise of the general power conferred by sec. 91 to make laws for the peace, order and good government of Canada, or of the exclusive legislative authority in relation to the regulation of trade and commerce, the discussion, both comprehensive and exhaustive of the extent of those powers made by my Lord the Chief Justice in his reasons on the Reference concerning *The Natural Products Marketing Act* (p. 403) relieves me of the necessity of examining these contentions here, for, to my mind, they establish conclusively that the Dominion Parliament cannot rely on these powers in support of the validity of the legislation under submission.

It will only be necessary, therefore, to scrutinize the arguments put forward by the Dominion Government that the Acts are valid as an exercise of the power "necessary or proper for performing the obligations of Canada, or any province thereof . . . towards foreign countries, arising under the Draft Conventions duly ratified by Canada as a Member of the International Labour Organization."

Part XIII of the Treaty of Versailles is entirely devoted to labour questions. Under it, a permanent organization is established for the promotion of the objects set forth in that part. The original members of this organization are the original members of the League of Nations. Canada is such a member.

The permanent organization consists of a General Conference of the representatives of the members and an International Labour Office controlled by a Governing Body.

Meetings of the General Conference are held from time to time at which the Conference adopts proposals taking the form either (a) of a recommendation to be submitted to the members for consideration with a view to effect being given to it by national legislation or otherwise, or (b) of a draft international convention for ratification by the members.

The procedure is that, after the recommendation or draft convention has been indicated by the President and the Director of the Conference and after it has been deposited with the Secretary General of the League of Nations, the

1936
REFERENCES
re
THE WEEKLY
REST IN
INDUSTRIAL
UNDERTAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.
Rinfret J.

1936

REFERENCES

re
**THE WEEKLY
 REST IN
 INDUSTRIAL
 UNDER-
 TAKINGS ACT,
 THE
 MINIMUM
 WAGES ACT,
 AND THE
 LIMITATION
 OF HOURS OF
 WORK ACT.**

Rinfret J.

Secretary General is to communicate a certified copy to each of the members.

And then, under article 405,

Each of the Members undertakes that it will, within the period of one year at most from the closing of the session of the Conference, or if it is impossible owing to exceptional circumstances to do so within the period of one year, then at the earliest practicable moment and in no case later than eighteen months from the closing of the session of the Conference bring the recommendation or draft convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action.

In the case of a recommendation, the Members will inform the Secretary-General of the action taken.

In the case of a draft convention, the Member will, if it obtains the consent of the authority or authorities within whose competence the matter lies, communicate the formal ratification of the convention to the Secretary-General and will take such action as may be necessary to make effective the provisions of such convention.

If on a recommendation no legislative or other action is taken to make a recommendation effective, or if the draft convention fails to obtain the consent of the authority or authorities within whose competence the matter lies, no further obligation shall rest upon the Member.

In the case of a federal State, the power of which to enter into conventions on labour matters is subject to limitations, it shall be in the discretion of that Government to treat a draft convention to which such limitations apply as a recommendation only, and the provisions of this Article with respect to recommendations shall apply in such case.

The draft conventions here, by the Dominion Parliament, made the basis of the legislation now submitted to the Court were adopted by the General Conference of the International Labour Organization under the provisions just mentioned.

It should be stated, only for the purpose of accuracy, that, notwithstanding the fact that the proposals were adopted at the first session of the International Labour Conference, at its first annual meeting (29th October-29th November, 1919), it was not until 1935—and, therefore, sixteen years later—that the Dominion Government and the Federal Parliament undertook to take any action in regard to them and to enact legislation in order to carry them out.

Under article 405 just quoted, a Member undertook to bring a recommendation or a draft convention before the authority or authorities within whose competence the matter lies—

within the period of one year at most from the closing of the session of the Conference, or if it is impossible owing to exceptional circumstances to do so within the period of one year, then at the earliest practicable

moment and in no case later than eighteen months from the closing of the session of the Conference.

This was not done; but it is claimed that the provision is directory only and that no consequence can follow from the fact that the delay prescribed in the order had long since expired when the Dominion Government took action and the Dominion Parliament undertook to pass this legislation.

In the meantime, however, a fact, to my mind of very great importance, had taken place.

On November 6, 1920, an Order in Council was passed on the report of the then Minister of Justice dealing in part with the obligations of the Dominion of Canada as a Member of the International Labour Conference with relation to the Draft Conventions or Recommendations which may from time to time be adopted by the Conference, so that appropriate legislative and other action may be taken to give effect to them. The opinion expressed by the Minister upon this point was set forth in the Order in Council. That opinion was

that the provisions of the Labour Part of the Treaty of Versailles do not impose any obligation on the Dominion of Canada to enact into law the different draft conventions or recommendations which may from time to time be adopted by the Conference.

The obligation as set forth is simply in the nature of an undertaking on the part of each Member to bring the recommendations or draft conventions before the authority or authorities within whose competence the matter lies for the enactment of legislation or other action.

In the opinion of the Minister

the Government's obligation would be fully carried out if the different conventions and recommendations are brought before the competent authority, Dominion or Provincial, accordingly as it may appear, having regard to the scope and objects, the true nature and character of the legislation required to give effect to the proposals of the conventions and recommendations respectively that they fall within the legislative authority of the one or the other.

This Order in Council of the 6th November, 1920, also embodied the Minister's opinion upon the question whether the provisions of the Draft Convention limiting the hours of work in industrial undertakings came within the legislative competence of the Parliament of Canada or of the provincial legislature.

The Minister reported that the proposals of this Convention

1936

REFERENCES
re
THE WEEKLY
REST IN
INDUSTRIAL
UNDERTAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.
Rinfret J.

1936

REFERENCES

re

THE WEEKLY

REST IN

INDUSTRIAL

UNDER-

TAKINGS ACT,

THE

MINIMUM

WAGES ACT,

AND THE

LIMITATION

OF HOURS OF

WORK ACT.

Rinfret J.

involve legislation which is competent to Parliament in as far as Dominion works and undertakings are affected, but which the provincial legislatures have otherwise the power to enact and apply generally and comprehensively.

Notwithstanding the view expressed in the Order in Council of November 6, 1920, as doubt existed in certain quarters as to the jurisdiction of the federal and provincial authorities respectively, the Committee of the Privy Council of Canada, upon a report dated the 23rd December, 1924, from the Minister of Justice, considered it expedient that the question as to the respective powers of the Parliament of Canada and of the provincial legislature in relation to the enactment of the legislation required to give effect to the provisions of the said Draft Convention should be judicially determined; and accordingly the following questions were then referred to the Supreme Court of Canada:—

(1) What is the nature of the obligations of the Dominion of Canada as a Member of the International Labour Conference, under the provisions of the Labour Part (Part XIII) of the Treaty of Versailles and of the corresponding provisions of the other Treaties of Peace, with relation to such draft conventions and recommendations as may be from time to time adopted by the said Conference under the authority of and pursuant to the aforesaid provisions?

(2) Are the legislatures of the provinces the authorities within whose competence the subject-matter of the said draft convention (The Limitation of the Hours of Work Act) in whole or in part lies before whom such draft convention should be brought, under the provisions of Article 405 of the Treaty of Peace with Germany, for the enactment of legislation or other action?

(3) If the subject-matter of the said draft convention be, in part only, within the competence of the legislatures of the provinces, then in what particular or particulars, or to what extent, is the subject-matter of the draft convention within the competence of the legislatures?

(4) If the subject-matter of the said draft convention be, in part only, within the competence of the legislatures of the provinces, then in what particular or particulars, or to what extent, is the subject-matter of the draft convention within the competence of the Parliament of Canada?

The answers of the Court and the reasons for those answers are reported (1).

To the first question, the answer was that

The obligation is simply in the nature of an undertaking to bring the recommendation or draft convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action.

To the second question, the answer was

Yes, in part.

A reference to the reasons will show that the Court was unanimously of opinion that

Under the scheme of distribution of legislative authority in the *British North America Act*, legislative jurisdiction touching the subject-matter of this convention is, subject to a qualification to be mentioned, primarily vested in the provinces. * * * This general proposition is subject to this qualification, namely, that as a rule a province has no authority to regulate the hours of employment of the servants of the Dominion Government.

* * *

It is necessary to observe, also, that as regards these parts of Canada which are not included within the limits of any province, the legislative authority in relation to civil rights generally, and to the subject-matter of the convention in particular, is the Dominion Parliament.

The answer to the third question was:—

The subject-matter is generally within the competence of the legislatures of the provinces, but the authority vested in these legislatures does not enable them to give the force of law to provisions such as those contained in the draft convention in relation to servants of the Dominion Government, or to legislate for these parts of Canada which are not within the boundaries of a province.

The answer to the fourth question was:—

The Parliament of Canada has exclusive legislative authority in those parts of Canada not within the boundaries of any province, and also upon the subjects dealt with in the draft convention in relation to the servants of the Dominion Government.

The conclusion of the unanimous judgment of this Court in the matter was that

the draft convention ought to be brought before the Parliament of Canada as being the competent legislative authority for those parts of Canada not within the boundaries of any province; and if servants of the Dominion Government engaged in industrial undertakings as defined by the convention are within the scope of its provisions, then the Dominion Parliament is the competent authority also to give force of law to those provisions as applicable to such persons.

The convention should also be brought before the Lieutenant-Governor of each of the provinces for the purpose of enabling him to bring it to the attention of the Provincial Legislature as possessing, subject to the qualification mentioned, legislative jurisdiction within the province in relation to the subject-matter of the convention.

The reference made in 1925 went no further and, therefore, the opinion then given may be regarded as binding upon this Court, except in so far as it may have been superseded by subsequent pronouncements of the Privy Council in the *Reference concerning the regulation and control of Aeronautics in Canada* (1), and the *Reference concerning the regulation and control of Radio communication in Canada* (2).

1936

REFERENCES

re

THE WEEKLY
REST IN
INDUSTRIAL
UNDERTAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.

Rinfret J.

(1) [1932] A.C. 54.

(2) [1932] A.C. 304.

1936

REFERENCES
 re
 THE WEEKLY
 REST IN
 INDUSTRIAL
 UNDER-
 TAKINGS ACT,
 THE
 MINIMUM
 WAGES ACT,
 AND THE
 LIMITATION
 OF HOURS OF
 WORK ACT.
 RINFRET J.
 —

On the points that we are now discussing I find it impossible to distinguish between *The Limitation of the Hours of Work Act*, which was the subject-matter of the reference of 1925 to this Court (again submitted in the present reference) and *The Weekly Rest in Industrial Undertakings Act*, or *The Minimum Wages Act*

These conventions are not treaties within the meaning of sec. 132 of the B.N.A. Act, more particularly as the word was understood at the time of the adoption of the Act by the Imperial Parliament. Moreover, they are not treaties between the Empire and Foreign Countries in respect of which "obligations of Canada or of any province thereof as part of the British Empire towards foreign countries" might have arisen. Consequently, sec. 132 in terms does not apply to these conventions.

It was decided, however, by the Privy Council on the *Radio Reference* (1), that certain class of conventions, of which Canada as a dominion was one of the signatories, not being mentioned explicitly in either sec. 91 or sec. 92 fell within the general words at the opening of sec. 91 assigning to the Parliament of the Dominion the power to make laws "for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces." And their Lordships "in fine, though agreeing that the convention was not such a treaty as is defined in s. 132, thought that it comes to the same thing."

Both in the *Aeronautics Reference* (2) and in the *Radio Reference* (1), however, the Privy Council, at the same time as it declared that the validity of the legislation could be supported as an exercise of the powers derived from sec. 132 or from the residuary power to make laws for the peace, order and good government of Canada, also came to the conclusion that the subject of aeronautics and the subject of radio came under one or more of the enumerated heads of sec. 91 of the B.N.A. Act, radio, moreover, belonging to such class of subjects as were expressly excepted in the enumeration of the classes of subjects by the Act assigned exclusively to the legislatures of the provinces (91-29).

(1) [1932] A.C. 304, at 312.

(2) [1932] A.C. 54.

I will have to make further observations on this point later on.

Another remark to be made in connection with the aeronautics and radio judgments in the Privy Council is that, in the former case, their Lordships were dealing with a treaty convention under sec. 132, and, in the latter case, they were dealing with a convention of a character quite different from those under submission and of which they said that it "comes to the same thing as a treaty."

It would seem to me, therefore, that these two decisions are not authorities upon the question of wherein lies as between the Parliament of Canada and the Legislatures of the Provinces the powers necessary or proper for performing the obligations of Canada or of any province thereof arising out of conventions adopted by the International Labour Conference.

But on the present reference, as I view it, it is not necessary for this Court to enter into the discussion of this last point.

Whether treaty or convention, the questions under consideration in the *Aeronautics* (1) and the *Radio* (2) references were concerned with the validity of legislation enacted for the purpose of performing obligations arising as a result of international agreements already made and the validity whereof was not disputed.

In those references, the question whether the treaty or convention had been properly and competently signed, adopted or ratified was not in question, either in this Court or in the Privy Council.

Now, with deference, I make a very great distinction between the power to create an international obligation and the power to perform it when once it has been created.

We may leave aside the aeronautics and radio decisions, which were concerned merely with the validity of laws enacted for the purpose of performing foreign obligations, because in the present case what we have mainly to consider is the power to create foreign obligations. On that particular point, that is to say: on that point of where lies the power to create an international obligation, the only decision so far is the judgment of this Court on the refer-

1936
REFERENCES
THE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.
RINFRET J.

1936
REFERENCES
TO
THE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.
Rinfret J.
—

ence In the matter of legislative jurisdiction over hours of labour (1). I fail to find anything in the subsequent judgments of the Privy Council superseding what was said unanimously by this Court on that subject. The authority, in my humble opinion, is as conclusive as it can be, since that reference was concerned with one of the draft conventions on which the Attorney General of Canada now seeks to rely in support of the validity of the legislation now submitted to us, and since no substantial distinction in the pertinent sense can be made between the draft convention then under consideration and the two other conventions dealing with *The Weekly Rest* and *The Minimum Wages*. With deference, I think the decision of 1925 (1) is certainly binding on this Court and that, as a consequence, it must follow that the obligation of Canada with respect to these draft conventions is simply to bring them before the authority within whose competence the matter lies for the enactment of legislation or other action, or, in the premises, before the legislatures of the provinces, except for the provisions of those draft conventions in relation to servants of the Dominion Government, or in relation to those parts of Canada which are not within the boundaries of a province.

Let it be granted that under the scheme of the *British North America Act* the provinces of Canada were “federally united into one Dominion”; that the Act provides for one nation, not for several nations; that the provinces have no status in international law, they are not States and are not recognized as such. Let it be conceded from these premises that the Government of Canada is the proper medium for all international relations and that “for international purposes, it should be regarded as a unity” (Keith on Responsible Government in the Dominions, 1909, pp. 134-135). It seems to me that, having regard to the fundamental spirit of the Constitution, a distinction must necessarily be drawn between the competency to discharge international obligations and the competency to enter into them.

While it is, no doubt, perfectly true that “overwhelming convenience—under the circumstances amounting to necessity” (Anglin C.J.C. in the *Radio Reference*) (2), dic-

(1) [1925] S.C.R. 505.

(2) [1931] S.C.R. 541, at 545, 546.

tates the answers that the performance of obligations, both federal and provincial, arising out of international agreements must be left exclusively to the jurisdiction of the Dominion Parliament, I fail to see the same necessity with regard to the power to create these foreign obligations. When once they have been undertaken, Canada is in honour bound to perform them; but there is no necessity, nor even obligation, to undertake them. If the effect of the undertaking is that a subject of legislation within the exclusive jurisdiction of the province will thereby be transferred from that jurisdiction to the jurisdiction of the Dominion Parliament, I consider it to be within the clear spirit of the *British North America Act* that the obligation should not be created or entered into before the provinces have given their consent thereto. In the particular case that we are now considering, it is my humble view that such was the effect of the judgment of this Court in the matter of the Reference of 1925 (1). Such, it seems to me with respect, was the interpretation put by this Court upon the pertinent clause of article 405 of the Treaty of Peace.

Under the distribution of legislative powers, Property and Civil Rights in the Province were ascribed to the exclusive jurisdiction of the legislature in each province.

A civil right does not change its nature just because it becomes the subject-matter of a convention with foreign States. It continues to be the same civil right. When once the convention has been properly adopted and ratified, it is, no doubt, transferred to the federal field for the enactment of laws necessary or proper for performing the obligations arising under the convention. That is, as I understand it, the effect of the decisions of the Privy Council on the *Aeronautics* (2) and *Radio* (3) References. But before the international obligation has been properly and competently created, the civil right under the jurisdiction of the provinces is always the same civil right, and I cannot see where the Dominion Parliament in the *British North America Act* finds the power to appropriate it for the purpose of dealing with it internationally without having previously secured the consent of the provinces.

In the present cases, we are dealing with *Weekly Rest in Industrial Undertakings*, *Minimum Wages* in ordinary con-

1936

REFERENCES
re
THE WEEKLY
REST IN
INDUSTRIAL
UNDERTAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.

Rinfret J.
—

(1) [1925] S.C.R. 505.

(2) [1932] A.C. 54.

(3) [1932] A.C. 304.

1936
REFERENCES
re
THE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.
Rinfret J.
—

tracts of employment and *Limitation of Hours of Work*, matters which are fundamentally of the competence of the legislatures in each province. But in order to put the point more forcibly, let us assume that the subject matter of the convention was education, a subject in relation to which "in and for each province the legislature may exclusively make laws" (Sec. 93). Can it be said that it would be within the spirit of the Constitution that the Dominion Parliament might acquire exclusive jurisdiction over that very essential subject as a consequence of the fact that the Dominion Government would decide in regard to it to make a convention with a foreign power?

It might be objected that education would not be regarded as the proper subject matter of a treaty or an international convention as these arrangements are generally understood. Until comparatively recently, neither could it be said that questions affecting *The Weekly Rest in Undertakings*, *The Minimum Wages* or *The Limitation of Hours of Work* would be considered as proper subjects for international conventions.

The treaty-making power is the prerogative of the Crown. In ordinary practice, it is exercised on the recommendation of the Crown's advisers.

In Canada, the practice has grown gradually to enter into international conventions through the medium of the Governor in Council. It does appear that it would be directly against the intendment of the *British North America Act* that the King or the Governor General should enter into an international agreement dealing with matters exclusively assigned to the jurisdiction of the provinces solely upon the advice of the federal Ministers who, either by themselves or even through the instrumentality of the Dominion Parliament are prohibited by the Constitution from assuming jurisdiction over these matters.

I would like to conclude with the words of Lord Watson, in the *Maritime Bank* case (1):

The object of the Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy.

It follows from all that I have said that, in my opinion, the draft conventions upon which is based the legislation now submitted to us have not been properly and competently ratified, that they could not be so ratified without the consent of the legislature in each province, both by force of the *British North America Act* and upon the proper interpretation of article 405 of the Treaty of Versailles; and that, for that reason, the Acts now submitted are *ultra vires* of the Parliament of Canada.

CANNON J.—When an Act of Parliament is challenged before this Court as unconstitutional, our duty is to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. Our only power is to announce our considered judgment upon the question. This Court neither approves nor condemns any legislative policy. Our delicate and difficult office is to ascertain and declare whether the legislation is in accordance with or contravention of the provisions of the Constitution. Having done so, our duty ends.

The question is not what power the Federal Government ought to have, but what powers, in fact, have been given to it by the B.N.A. Act. It hardly seems necessary to reiterate that ours is a dual form of government; that in every province there are two governments. We differ radically from nations where all legislative power, without restriction, is vested in a parliament, or other legislative body, subject to no restriction.

It must also be borne in mind that the attainment of a prohibited end may not be accomplished under the pretext of the exercise of powers which are granted. We may accept as established doctrine that any provision in an Act of Parliament ostensibly enacted under power granted by the constitution not naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something plainly within the provincial jurisdiction is invalid and cannot be enforced.

Nor can it help to declare that local conditions throughout the nation have created a situation of national concern; for this is but to say that whenever there is a widespread similarity of local conditions, Parliament may ignore constitutional limitations upon its own powers and usurp those reserved to the provinces.

1936
REFERENCES
TO
THE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.
Rinfret J.

1936

REFERENCES
reTHE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT,THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.

CANNON J.

Until recently there was no suggestion of the existence of any such power in the Federal Parliament. The opinion of the framers of the Constitution, the decisions of the courts and the writings of commentators, deny to the Federal Parliament the authority whereby every provision and every fair implication from the B.N.A. Act may be subverted, the autonomy of the provinces obliterated and the Dominion of Canada converted into a central government exercising uncontrolled police power in every province, superseding all local control or regulation of the affairs of the province. It was never suggested that any power granted by the constitution to Parliament, or necessarily implied, could be used for the destruction of self-government in the provinces. It never occurred to any of the commentators that the general welfare of the Dominion might be served by obliterating the constituent provinces. It seems to be contended that, under the residual power for peace, order and good government, Parliament has power to tear down the barriers, to invade the provincial jurisdiction and to impose Legislative Union for the whole of Canada, subject to no restriction, save such as are self-imposed.

That the provinces agreed only to a Federal Union appears abundantly by a perusal of what was said by Sir J. A. Macdonald, then Attorney General of Upper Canada, before the Canadian Parliament sitting in the city of Quebec on the 6th February, 1865

The third and only means of solution for our difficulties was the junction of the provinces either in a Federal or a Legislative Union. Now, as regards the comparative advantages of a Legislative and a Federal Union, I have never hesitated to state my own opinions. I have again and again stated in the House, that, if practicable, I thought a Legislative Union would be preferable. I have always contended that if we could agree to have one government and one parliament, legislating for the whole of these peoples, it would be the best, the cheapest, the most vigorous, and the strongest system of government we could adopt. But, on looking at the subject in the Conference, and discussing the matter as we did, most unreservedly, and with a desire to arrive at a satisfactory conclusion, we found that such a system was impracticable. In the first place, it would not meet the assent of the people of Lower Canada, because they felt that in their peculiar position—being in a minority, with a different language, nationality and religion from the majority—in case of a junction with the other provinces, their institutions and their laws might be assailed, and their ancestral associations, on which they prided themselves, attacked and prejudiced; it was found that any proposition which involved the absorption of the individuality of Lower Canada—if I may use the expression—would not be received with favour by her people. We

found too, that though their people speak the same language and enjoy the same system of law as the people of Upper Canada, a system founded on the common law of England, there was as great a disinclination on the part of the various Maritime Provinces to lose their individuality, as political organizations, as we observed in the case of Lower Canada herself. Therefore, we were forced to the conclusion that we must either abandon the idea of union altogether, or devise a system of union in which the separate provincial organizations would be in some degree preserved. So that those who were, like myself, in favour of a Legislative Union, were obliged to modify their views and accept the project of a Federal Union as the only scheme practicable, even for the Maritime Provinces. Because, although the law of those provinces is founded on the common law of England, yet every one of them has a large amount of law of its own—colonial law framed by itself, and affecting every relation of life, such as laws of property, municipal and assessment laws; laws relating to the liberty of the subject, and to all the great interests contemplated in legislation; we found, in short, that the statutory law of the different provinces was so varied and diversified that it was almost impossible to weld them into a Legislative Union at once. Why, sir, if you only consider the innumerable subjects of legislation peculiar to new countries, and that every one of those five colonies had particular laws of its own, to which its people have been accustomed and are attached, you will see the difficulty of effecting and working a Legislative Union, and bringing about an assimilation of the local as well as general laws of the whole of the provinces. We in Upper Canada understand from the nature and operation of our peculiar municipal law, of which we know the value, the difficulty of framing a general system of legislation on local matters which would meet the wishes and fulfil the requirements of the several provinces.

The whole scheme of Confederation, as propounded by the Conference, as agreed to and sanctioned by the Canadian Government, and as now presented for the consideration of the people and the Legislature, bears upon its face the marks of compromise. Of necessity there must have been a great deal of mutual concession.

As I stated in the preliminary discussion, we must consider this scheme in the light of a treaty.

The Conference having come to the conclusion that a legislative union, pure and simple, was impracticable, our next attempt was to form a government upon federal principles, which would give to the General Government the strength of a legislative and administrative union, while at the same time it preserved that liberty of action for the different sections which is allowed by a Federal Union. And I am strong in the belief that we have hit upon the happy medium in those resolutions, and that we have formed a scheme of government which unites the advantages of both, giving us the strength of a legislative union and the sectional freedom of a federal union, with protection to local interests.

I shall not detain the House by entering into a consideration at any length of the different powers conferred upon the General Parliament as contradistinguished from those reserved to the local legislatures; but any honourable member on examining the list of different subjects which are to be assigned to the General and Local Legislatures respectively, will see that all the great questions which affect the general interests of the Confederacy as a whole, are confided to the Federal Parliament, while the local interests and local laws of each section are preserved intact, and entrusted to the care of the local bodies. As a matter of course, the

1936

REFERENCES
 re
 THE WEEKLY
 REST IN
 INDUSTRIAL
 UNDER-
 TAKINGS ACT,
 THE
 MINIMUM
 WAGES ACT,
 AND THE
 LIMITATION
 OF HOURS OF
 WORK ACT.

CANNON J.
 —

1936

REFERENCES

re

THE WEEKLY
REST IN
INDUSTRIAL
UNDERTAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.

CANNON J.

General Parliament must have the power of dealing with the public debt and property of the Confederation. Of course, too, it must have the regulation of trade and commerce, of customs and excise. The Federal Parliament must have the sovereign power of raising money from such sources and by such means as the representatives of the people will allow. It will be seen that the local legislatures have the control of all local works; and it is a matter of great importance, and one of the chief advantages of the Federal Union and of local legislatures, that *each province will have the power and means of developing its own resources and aiding its own progress after its own fashion and in its own way. Therefore, all the local improvements, all local enterprises or undertakings of any kind, have been left to the care and management of the local legislatures of each province.*

The criminal law too—the determination of what is a crime and what is not and how crime shall be punished—is left to the General Government. This is a matter almost of necessity. It is of great importance that we should have the same criminal law throughout these provinces—that what is a crime in one part of British America, should be a crime in every part—that there should be the same protection of life and property as in another. It is one of the defects in the United States system, that each separate state has or may have a criminal code of its own,—that what may be a capital offence in one state, may be a venial offence, punishable slightly, in another. But under our Constitution we shall have one body of criminal law, based on the criminal law of England, and operating equally throughout British America, so that a British American belonging to what province he may, or going to any other part of the Confederation, knows what his rights are in that respect, and what his punishment will be if an offender against the criminal laws of the land. I think this is one of the most marked instances in which we take advantage of the experience derived from our observations of the defects in the Constitution of the neighbouring Republic.

Although, therefore, a legislative union was found to be almost impracticable, it was understood, so far as we could influence the future, that the first act of the Confederate Government should be to procure an assimilation of the statutory law of all those provinces, which has, as its root and foundation, the common law of England. But to prevent local interests from being over-ridden, the same section makes provision, that, while power is given to the General Legislature to deal with this subject, *no change in this respect should have the force and authority of law in any province until sanctioned by the Legislature of that province.*

Sir George Etienne Cartier closed his speech by stating:

So if these resolutions were adopted by Canada, as he had no doubt they would, and by the other Colonial Legislatures, the Imperial Government would be called upon to pass a measure which would have for its effect to give a strong central or general government and local governments, which would at once secure and guard the persons, the properties and the civil and religious rights belonging to the population of each section.

The *British North America Act*, in its preamble, says:

Whereas the Provinces of Canada, Nova Scotia and New Brunswick have expressed their desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom.

Articles 3 and 4 provided for the proclamation of the Dominion, composed of four provinces Ontario, Quebec, Nova Scotia and New Brunswick; which preserved their identity and never ceased at any time to form distinct and separate governments. The provinces created, by their union, a new power; but it is impossible to say that they owe to it their existence. On the contrary, the provinces created the Dominion.

Lord Carnavon, in the House of Lords, on the second reading of the B.N.A. Act, said:

A legislative union is under existing circumstances impracticable. The Maritime Provinces are ill-disposed to surrender their separate life, and to merge their individuality in the political organization of the general body. It is in their case, impossible, even if it were desirable, by a stroke of the pen to bring about a complete assimilation of their institutions to those of their neighbours. Lower Canada, too, is jealous, as she is deservedly proud, of their ancestral customs and traditions; she is wedded to her peculiar institutions, and will enter this Union only upon the distinct understanding she retains them.

Chief Justice Dorion, who had taken part, as a member of the legislature, in the Confederation debates, gave the following opinion quoted at page 143 of volume III of *La Thémis*:

There is no difference between the powers of the local and Dominion legislatures within their own sphere. That is the powers of the local legislature within its own sphere are co-extensive with the powers of the Dominion government within its own sphere. The one is not inferior to the other. I find that the powers of the old legislature of Canada is extended to the local legislatures of the different provinces. We have a government modelled on the British constitution. We have responsible government in all provinces, and these powers are not introduced by legislators, but in conformity with usage. It is founded on the consent and recognition of those principles which guide the British constitution. I do not read that the new constitution was to begin an entirely new form of government, or to deprive the legislature of any of the powers which existed before, but to effect a division of them, some of them are given to the local legislatures, but I find none of them curtailed.

And Sandborn, J., said:

The *British North America Act* of 1867 was enacted in response to the petition of the provinces of Canada, Nova Scotia and New Brunswick, as stated in the preamble of the Act, to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a constitution similar in principle to that of the United Kingdom. The powers of legislation and representative government upon the principle of the British constitution, or, as it has commonly been called, responsible government, were not new to Canada. They had been

1936
REFERENCES
72
THE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.
CANNON J.

1936

REFERENCES
reTHE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT,
THEMINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.

CANNON J.

conceded to Canada and exercised in their largest sense from the time of the Union Act of 1840, and in a somewhat more restricted sense from the Act of 1791 to 1840. The late province of Lower Canada was constituted a separate province by the Act of 1791, with a governor, a legislative council and a legislative assembly, and it has never lost its identity. It had a separate body of laws, both as respects statute and common law, in civil matters no powers that had been conceded were intended to be taken away by the *British North America Act* of 1867, and none, in fact, were taken away, as it is not the wont of the British government to withdraw constitutional franchises once conceded. This Act, according to my understanding of it, distributed powers already existing to be exercised within their prescribed limits, to different legislatures constituting one central legislature and several subordinate ones, all upon the same model, without destroying the autonomy of the provinces, or breaking the continuity of the respective provinces, in a certain sense, the powers of the federal parliament were derived from the provinces, subject, of course, to the whole being a colonial dependency of the British Crown. The provinces of Quebec and Ontario are by the sixth section of the Act, declared to be the same that formerly comprised Upper and Lower Canada. This recognizes their previous existence prior to the Union Act of 1840. All through the Act, these provinces are recognized as having previous existence and a constitutional history upon which the new fabric is based. Their laws remain unchanged, and the constitution is preserved. The offices are the same in name and duties, except as to the office of lieutenant-governor, who is placed in the same relation to the province of Quebec, as that which the governor general sustained to the late province of Canada. I think it would be a great mistake to ignore the past government powers conferred upon and exercised in the province now called Quebec, in determining the nature and privileges of the legislative assembly of this province.

The procedure recommended by the Imperial Conferences in 1926 and 1930 regarding legislation or international agreements by one of the self-governing parts of the Empire which may affect the interests of other self-governing parts, i.e. previous consultation between His Majesty's ministers in the several parts concerned, should be applied by the central and provincial governments specially before ratifying any international agreement—not falling under Section 132 of the B.N.A. Act. The only direct legislative authority expressly given to the Parliament and Government of Canada concerning foreign affairs is found in this section and is limited to the performance of the obligations of Canada or any province thereof arising under treaties between the Empire as a whole and a foreign country. The Imperial Parliament saw to it that Imperial interests would be protected by federal legislation. But to pass legislation—affecting the provinces—to ratify a treaty or agreement by Canada alone—under an evolution which came to pass since Confederation—with a foreign power, previous

consultations between the federal and provincial self-governing parts of our Confederation seem to me logical and the only way to preserve peace, order and good government in Canada and save the very roots of the tree to which our constitution has been compared. In order to grow, if it be a growing instrument, it must keep contact with its native soil—and draw from the constituting provinces new force and efficiency.

The provinces agreed to this principle of Legislative Union and the Imperial Parliament granted it to a central Parliament strictly within the ambit of 91; any legislation by this Parliament attempting to legislate uniformly for the whole of Canada on any subject exclusively retained by the provinces and within the natural and obvious meaning of section 92 must, in my opinion, be *prima facie*, considered as *ultra vires* of the Dominion.

The additions by some decisions to the powers of the Dominion in emergency cases must be applied, if at all, with the greatest caution. In the words of Sir John Macdonald, “the scheme must be considered in the light of a treaty” not to be lightly interfered with by way of commentary and gloss.

If any changes are required to face new situations or to cope with the increased importance of Canada as a nation, they may be secured by an amendment to the Act; but neither this Court nor the Privy Council should be called upon to legislate in the matter by treating the constitution as a growing tree confided to their care. We have nothing to do with the growth or with the making of the law in constitutional matters. The Imperial Parliament alone can change what they enacted—or add to it. New branches to acquire the force of law, must be embodied in the statute, not in judgments or commentaries.

The above considerations may be applied, *mutatis mutandis*, to all the acts referred to us for consideration, but I would add a few words with respect to the three acts based on the so-called Geneva Labour Conventions mentioned in Order in Council 3454, being chapters 14, 44 and 63 of the statutes of 1935.

Such labour conventions binding Canada independently from the rest of the Empire do not fall under 132; they were not even contemplated as feasible in 1867 when the

1936
REFERENCES
THE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.
CANNON J.

1936
REFERENCES
re
THE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.
CANNON J.
—

B.N.A. Act was passed. Radio and aeronautics are also new matters not existing at that time and had to be dealt with by the Privy Council as outside the enumerated subjects of 91 and 92; and these two decisions must be considered as *arrêts d'espèce* and confined to the subject matters which both had necessarily interprovincial and international aspects.

But the payment of wages for labour, the weekly rest and the rate of wages and length of hours of work were well known subjects in 1867 and they were, by common agreement, reserved by the Imperial Parliament to the Provinces as purely local and private matters of property and civil rights.

Therefore, in the words of section 405 of the treaty of Versailles, Canada as a federal state, has only a "power to enter into convention on labour matters *subject to limitations*" and the draft convention should have been treated as a "recommendation only." Such recommendation is to be submitted to the members for "consideration with a view to effect being given to it by national legislation or otherwise." The Versailles Treaty recognizes that in certain cases effect can be given to a labour agreement "otherwise" than by national legislation.

In these cases, it does not appear that either the recommendations or the draft conventions were submitted to the provinces, i.e., the "authorities within whose competence the matter lies for the enactment of legislation or other action."

To my mind, this is fatal to the validity of the ratification of these labour conventions by the Federal authorities.

As an internal matter, such changes in the respective constitutional powers of the provinces and of the Central Government cannot be justified by invoking some clauses of the treaty of Versailles. Respect of their property and civil rights was guaranteed by the British Crown to the inhabitants of the original provinces as far back as the treaty of Paris in 1763; this was confirmed by the constitution of 1867 which cannot be changed in this essential part except by an Imperial statute, as plainly set forth in the Act of Westminster of 1931, sec. 7. It is not admissible that the Parliament and the Government of Canada could appropriate these powers, exclusively reserved to the provinces,

by the simple process of ratifying a labour convention passed at Geneva with representatives of foreign countries. The framers of our constitution and the Privy Council by their recent judgments in the *Radio* (1) and *Aeronautics* (2) cases never intended to plant in its bosom the seeds of its own destruction. If such interference with provincial rights by way of international agreements is admitted as *intra vires* of the central government, we may as well say that we have in Canada a confederation in name, but a legislative union in fact. Uniformity is not in the spirit of our constitution. We have not a single community in this country. We have nine commonwealths, several different communities. This is the fact embodied in the law. It may be wise or unwise, according to the preferences and predilection of every one, but this is the basis of our constitution. Diversity is the basis of our constitution. The federative system was adopted in order to give to the provinces their autonomy and to secure, specially in Quebec, the rights to their own customs as crystallized in their civil law. No gloss or commentary to be found in judicial pronouncements can alter the constitution of this country. It is a written document which can be amended or added to, only by legislation. No usage or judge made law can be invoked, no practice can be introduced to change the division of powers as set forth in 91 and 92, however desirable or opportune it may seem. If amendments are needed and asked for, they should be granted by the Imperial Parliament.

In 1867, it was found necessary in order to achieve confederation, to give us a federal form of government, more cumbersome and more expensive though it be, on account of the superior liberty it gives to the people.

This cannot be changed by the indirect way of a labour convention, in furtherance of some pious wish of the treaty of Versailles, at a time when its binding authority and wisdom is universally contested; and, albeit, many years after notification to Canada of these particular so-called draft conventions. The King's prerogative has not been used to do away with the statutory rights of His Canadian subjects.

These are not references to an international tribunal; we are not called upon to determine, in the absence of

1936
REFERENCES
re
THE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.
CANNON J.
—

(1) [1932] A.C. 304.

(2) [1932] A.C. 54.

1936
REFERENCES
^{re}
THE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.
CANNON J.
—

foreign powers, what effect such at ratification by the Canadian government might have in the international field. But Canada is not an independent sovereign state, and the Parliament of Canada is *not a Parliament of unlimited authority. Every Parliament in Canada—not only the Parliament of the Dominion, but also the legislature in each province—is necessarily of limited authority, because it has not been given and does not possess the wide, the plenary authority over the whole field of legislation which is possessed by the Parliament of Great Britain or of an independent sovereign state.* Upon the union—upon the creation, not of one Parliament for Canada, but of one central Parliament and four provincial legislatures, each of them—the central Parliament just as much as the others—had limits to its jurisdiction, by the necessity of the case. That affords at once a very strong reason why no one of these parliaments should have jurisdiction over the Constitution of any other of them.

In 1867, when the agreement for entering into this Union was under discussion and being arrived at by the provinces, they wanted to create, and they did create by their agreement and by the statute which followed upon their agreement, a Parliament which was to have a limited jurisdiction, and no power to amend its Constitution.

These are some of the reasons why foreign powers, when dealing with Canada, must always keep in mind that neither the Governor General in Council, nor Parliament, can in any way, and specifically by an agreement with a foreign power, change the constitution of Canada or take away from the provinces their competency to deal exclusively with the enumerated subjects of section 92. Before accepting as binding any agreement under section 405 of the treaty of Versailles, foreign powers must take notice that this country's constitution is a federal, not a legislative union.

CROCKET J.—It cannot be doubted that all these statutes, no matter from what point of view they are considered, embody legislation which is directly aimed at the regulation and control of contracts of employment, private as well as public, in every Province of the Dominion, and thus deal in a very real and radical sense with civil rights in all the provinces of Canada alike. The

fundamental question before us, therefore is: Can any authority be found within the four corners of the B.N.A. Act for the exercise of such legislative power by the Parliament of Canada?

In my opinion none of the draft conventions of the International Labour Organization of the League of Nations, upon the ratification of which by the Government of Canada it has been sought to justify the enactment of all this legislation, fall within the terms of s. 132 of the B.N.A. Act. That section provides:—

The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada, or of any Province thereof, as part of the British Empire, towards foreign countries arising under treaties between the Empire and such foreign countries.

The powers granted by this section are strictly limited to the performance of obligations towards foreign countries arising under treaties between the Empire and such foreign countries. Unquestionably the section does not embrace obligations arising under any form of convention or agreement entered into by the Government of Canada with the Government of any other country within the Empire, nor does it contemplate or suggest any form of convention or agreement with the Government of any foreign country other than a treaty in the true sense of the term. As Lord Dunedin pointed out in the *Radio* case (1), the idea of Canada as a Dominion being bound by a convention equivalent to a treaty with foreign powers was unthought of in 1867, when the B.N.A. Act was enacted, and the only class of treaty, which would bind Canada, was thought of as a treaty by Great Britain, that is to say, as I understand the reference, a treaty concluded by the Crown in the exercise of its prerogative as the sovereign of a single indivisible Empire on the advice of its constitutional advisers, the Imperial Government of Great Britain. Only by the exercise of this supreme authority could any treaty obligation be imposed on Canada or any other Dominion or dependency of the British Empire towards foreign nations within the intendment of the B.N.A. Act. The executive government and authority of and over Canada were expressly declared by s. 9 of the B.N.A. Act "to continue and be vested in the Queen," s. 2 having already declared that the

1936
REFERENCES
re
THE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.

CROCKET J.

(1) [1932] A.C. 304.

1936
REFERENCES
re
THE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.
CROCKET J.

provisions of the Act referring to Her Majesty the Queen extend also to the Heirs and Successors of Her Majesty, Kings and Queens of the United Kingdom of Great Britain and Ireland. There can hardly be a doubt that in the minds of the Fathers of Confederation and the framers of the B.N.A. Act the British Empire was visualized only as a single unit and not as a collection or commonwealth of separate nations, each of equal status with the United Kingdom of Great Britain and Ireland, with authority to conclude either treaties, or conventions analogous to treaties, on its own account with any foreign government. For my part I am unable to comprehend how any international convention, to which Canada in its new status, whatever that status may actually be, purports to become a party as a separate government, or any obligation resulting therefrom, can possibly be brought within the terms of s. 132—much less a mere draft convention, such as those of the International Labour Organization of the League of Nations. To my mind there is nothing which the judgment of the Judicial Committee in the *Radio* case (1) has more decisively settled than this: that if the Government of Canada by its own plenipotentiaries enters into an international convention with the Government of any other country, whether British or foreign, s. 132 cannot be relied upon as empowering the Parliament of Canada to enact legislation for the carrying out of any obligation arising under such a convention, and that, if such legislative power exists at all, it must be found, either under the enumerated heads of s. 91 or the introductory words of that section, the so-called residuary clause.

Even if the Treaty of Versailles were a treaty between the British Empire, as an undivided unit, and those foreign states, whose plenipotentiaries signed it, which I do not think it is, and not a treaty purporting to have been entered into by the self-governing Dominions of the Empire as separate governments, it could not, in my judgment, be said that there was any obligation, for the performance of which the Parliament of Canada was empowered within the terms of s. 132 to enact legislation as pertaining to an obligation imposed by that treaty upon Canada or any

(1) [1932] A.C. 304.

province thereof, as part of the British Empire. The obligation arose directly from a so-called international convention, purporting to have been ratified by Canada as a separate and distinct Government—an idea which is wholly incompatible with the conception of the Dominion of Canada as constituted by the B.N.A. Act.

As regards the residuary clause of s. 91, this empowers the Parliament of Canada

to make laws for the peace, order and good government of Canada in relation to all matters not coming within the class of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

It will be seen at once that this provision can only be invoked where the real subject-matter of the legislation does not fall within the classes of subjects which are exclusively assigned to the provinces by s. 92. To meet this obvious and formidable difficulty the learned counsel for the Dominion brought forward the much canvassed double aspect principle, by which, as I understand it, a matter, though it relates in one aspect and in some circumstances to a class of subjects, which is exclusively assigned by s. 92 to the legislative jurisdiction of the provinces, may nevertheless in another aspect and in other circumstances assume such nation-wide importance as to completely lose its original and normal identity within the purview of s. 92, and thus become at any time a matter falling within the general residuary clause of s. 91.

It was strongly argued that hours of work and the standard of wages and of living had attained such importance as subjects of legislation in Canada as to affect the body politic of the Dominion as a whole and thus to justify the Parliament of Canada in dealing with them in that aspect as matters demanding the intervention of Dominion legislation "for the peace, order and good government of Canada," notwithstanding that the general authority to make laws so plainly excludes all subject-matters coming within the scope of s. 92.

No doubt there have been pronouncements in the Privy Council which lend much colour to this argument, but I do not think that they can properly be interpreted as going to such a length as is now contended for. The learned Chief Justice has discussed very fully in dealing with the reference on the *Natural Products Marketing Act* (p. 403) the argument which was put forward in behalf of the

1936
REFERENCES
re
THE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.
CROCKET J.

1936

REFERENCES

re

THE WEEKLY

REST IN

INDUSTRIAL

UNDER-

TAKINGS ACT.

THE

MINIMUM

WAGES ACT,

AND THE

LIMITATION

OF HOURS OF

WORK ACT.

CROCKET J.

Dominion in this regard and I feel that I can add nothing to what he has said. There is certainly no authoritative decision to the effect that, once it is seen that the real subject-matter of a legislative enactment pertains in all its predominant characteristics to the regulation and control of civil rights in the provinces, it can rightfully be transferred to the legislative jurisdiction of the Parliament of Canada in virtue of the introductory words of s. 91 as a matter of legislation "for the peace, order and good government of Canada" in disregard of the plain and all important proviso that such jurisdiction may be exercised only in relation to matters "not coming within the classes of subjects assigned exclusively to the Legislatures of the Provinces." I cannot refrain from reiterating these cogent observations of Lord Watson in *Attorney-General for Ontario v. Attorney-General for Canada* (1):

To attach any other construction to the general power which, in supplement of its enumerated powers, is conferred upon the Parliament of Canada by s. 91, would, in their Lordships' opinion, not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces. If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order and good government of the Dominion, there is hardly a subject enumerated in s. 92 upon which it might not legislate, to the exclusion of the provincial legislatures.

These observations, it seems to me, present a conclusive answer to the argument which has been so strongly urged upon us in reference to the so-called double aspect principle. They demonstrate at least that the mere fact that Dominion legislation concerning any particular matter may be stated to be for the general advantage of Canada, or that the subject of the legislation has become as much a matter of national as of provincial concern to the several provinces, is not sufficient to remove that subject from the sphere of s. 92, to which in its normal and domestic aspect it primarily belongs, and transfer it to the jurisdiction of the Parliament of Canada under s. 91. It is true that local works and undertakings may be declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces, and that, when Parliament makes such a declaration with respect to any such local work or undertaking, it may

lawfully legislate in relation to it, but that is in virtue of the exceptions which are expressly made in enumerated head, no. 10, of s. 92, and the consequent application of enumerated head, no. 29 of s. 91 to such a work or undertaking.

Nor do I think that any authoritative decision can rightly be interpreted as warranting the conclusion that, once it appears that the real purpose and effect of a Dominion enactment is to interfere with private and civil rights in the provinces and that in that aspect it consequently falls within the sphere of legislation which has been exclusively reserved for the provinces, not only by the provisions of s. 92, but by the saving clause in the introduction of s. 91, such an enactment can possibly be justified under the general authority conferred on the Parliament of Canada. If such legislation could be maintained on the ground that it was for the peace, order and good government of Canada, it could only be by ignoring the explicit limitation, which is placed on the so-called general authority by the residuary clause itself with the obvious intention of preventing its application in the very sense now contended for, and thus protecting the provinces in the full enjoyment of their exclusive legislative rights as permanently guaranteed to them by s. 91.

It may be that in the event of the peace, order and good government of Canada as a whole being so menaced by some outstanding national peril as to render the intervention of the Dominion Parliament necessary as the only adequate means of meeting such an emergency, the Courts will not shrink from holding that such an emergency constitutes a subject-matter of legislation which is quite outside the purview of s. 92 and the limitation which the saving clause of s. 91 imposes on the general authority of the Parliament of Canada to make laws for the peace, order and good government of the country as a whole, but, apart from such considerations, I question very much if there has been any really conclusive judicial recognition of the double aspect principle relied upon. If there be any such conclusive authority, to which we are bound to give effect in this case, then, as was suggested by the Attorney General of Ontario, the provinces may as well bid adieu to s. 92, reinforced by the saving limitation in the residuary clause of s. 91, as the unassailable charter of their legislative rights.

1936
REFERENCES
re
THE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.
CROCKET J.

1936
REFERENCES
re
THE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.
CROCKET J.

I entirely concur in the opinion of the learned Chief Justice that there is nothing in the judgment in the *Aeronautics* case (1) of 1931 to indicate that the Lords of the Privy Council intended to detract from the judicial authority of decisions in the *Combines* case (2) and *Snider's* case (3), and that we are bound by those decisions, as well as the decision in the *Fort Frances* case (4), to hold that the legislation now in question, considered apart from the question of the performance of obligations arising out of binding international conventions, as distinguished from treaties proper within the meaning of s. 132, cannot be supported as legislation enacted for the peace, order and good government of Canada under the introductory clause of s. 91.

This brings me to a consideration of the further question as to whether the ratification by the Government of Canada of such draft international labour conventions as those of the General Conference of the International Labour Organization of the League of Nations, which themselves imposed no obligation of any kind upon the Government of Canada or any other government represented in that organization to give legislative effect or even to assent to any of them, can itself have the effect of vesting in the Parliament of Canada legislative jurisdiction which otherwise it would not possess under the B.N.A. Act.

It is said that we must now take it as settled by the decisions in the *Aeronautics* (1) and *Radio* (5) cases that international conventions and all obligations arising therefrom are matters which fall within the general authority of Parliament to make laws for the peace, order and good government of Canada in relation to matters not coming within the classes of subjects exclusively assigned to the legislatures of the provinces. If this means that, once the Government of Canada has concluded a convention with the Government of any other country, whether within or without the British Empire, that fact itself operates to exclude the subject-matter of the convention from s. 92, regardless of the fact that that subject-matter admittedly up to the time of the conclusion of the convention came within one or more of the classes of subjects exclusively assigned by that section to the legislative jurisdiction of

(1) [1932] A.C. 54.

(3) [1925] A.C. 396.

(2) [1922] 1 A.C. 191.

(4) [1923] A.C. 695.

(5) [1932] A.C. 304.

the provinces, I do not think that either of these cases, upon which counsel for the Dominion have so much relied, can properly be said to have laid down any such principle.

As to the *Aeronautics* decision (1), the legislation, which the Judicial Committee there considered, was s. 4 of the *Aeronautics Act*, c. 3, Revised Statutes of Canada, which reproduced with an amendment the provisions of the *Air Board Act*, c. 11 of the statutes of Canada (1919). Lord Sankey L.C., who delivered the judgment of the Board, explained that the *Air Board Act* was enacted by the Parliament of Canada in 1919 with a view to performing her obligations as part of the British Empire under a convention relating to the Regulation of Aerial Navigation, which was signed by the representatives of the allied and associated powers in the Great War, including Canada, and was ratified by His Majesty on behalf of the British Empire on June 1, 1922, and at the time of the hearing was in force between the British Empire and seventeen other nations. "By article 1," he said,

the high contracting parties recognize that every Power (which includes Canada) has complete and exclusive sovereignty over the air space above its territory; by article 40, the British Dominions and India are deemed to be States for the purpose of this Convention.

The Lord Chancellor then stated some of the principal obligations undertaken by Canada as part of the British Empire under the stipulations of the convention. Some of these undoubtedly affected civil rights in the provinces. The real grounds of the decision appear in the following passage, which I reproduce from p. 77 (1):

To sum up, having regard (a) to the terms of s. 132; (b) to the terms of the Convention which covers almost every conceivable matter relating to aerial navigation; and (c) to the fact that further legislative powers in relation to aerial navigation reside in the Parliament of Canada by virtue of s. 91, items 2, 5 and 7, it would appear that substantially the whole field of legislation in regard to aerial navigation belongs to the Dominion. There may be a small portion of the field which is not by virtue of specific words in the *British North America Act* vested in the Dominion; but neither is it vested by specific words in the Provinces. As to that small portion it appears to the Board that it must necessarily belong to the Dominion under its power to make laws for the peace, order and good government of Canada. Further their Lordships are influenced by the facts that the subject of aerial navigation and the fulfilment of Canadian obligations under s. 132 are matters of national interest and importance and that aerial navigation is a class of subject which has attained such dimensions as to affect the body politic of the Dominion.

1936

REFERENCES
TO
THE WEEKLY
REST IN
INDUSTRIAL
UNDERTAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.

CROCKETT J.

1936
REFERENCES
TO
THE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.
CROCKET J.
—

As Viscount Dunedin, who sat in the *Aeronautics* case (1), pointed out in delivering the judgment of the Board in the *Radio* case (2) three or four months later, the leading consideration in the judgment of the Board in the earlier case was that the subject fell within the provisions of s. 132 of the B.N.A. Act. Apart from this, however, and the character of the Aerial Navigation Convention, it is clear that

the fact that further legislative powers in relation to aerial navigation reside in the Parliament of Canada by virtue of s. 91, items 2, 5 and 7 and (that) it would appear that substantially the whole field of legislation in regard to aerial navigation belongs to the Dominion.

and further,

the facts that the subject of aerial navigation and the fulfilment of Canadian obligations under s. 132 are matters of national interest and importance; and that aerial navigation is a class of subject which has attained such dimensions as to affect the body politic of the Dominion. also influenced their Lordships.

Whichever one of the different reasons assigned by the Board for the decision may have been regarded by their Lordships as the predominating reason, it seems to me that the judgment cannot, in any view, be interpreted as definitely laying down the principle that obligations arising out of all conventions between governments, not falling within the terms of s. 132 of the B.N.A. Act, are matters which, as subjects of legislation, cannot fall within s. 92, regardless of the form and character of the conventions themselves, and regardless also of whether they wholly or predominantly deal with matters which otherwise would unquestionably fall within one or more of the classes of subjects which that section reserves exclusively for the provincial legislatures. That their Lordships did not intend to lay down any uniform rule of such far-reaching consequences is shown by the following passage from the judgment itself:—

Under our system decided cases effectively construe the words of an Act of Parliament and establish principles and rules whereby its scope and effect may be interpreted. But there is always a danger that in the course of this process *the terms of the statute may come to be unduly extended and attention may be diverted from what has been enacted to what has been judicially said about the enactment.*

To borrow an analogy; there may be a range of sixty colours, each of which is so little different from its neighbour that it is difficult to make any distinction between the two, and yet at the one end of the range the colour may be white, and at the other end of the range black. Great

care must therefore be taken to consider each decision in the light of the circumstances of the case in view of which it was pronounced, especially in the interpretation of an Act such as the *British North America Act*, which was a great constitutional charter, and not to allow general phrases to obscure the underlying object of the Act, which was to establish a system of government upon essentially federal principles. *Useful as decided cases are, it is always advisable to get back to the words of the Act itself and to remember the object with which it was passed.*

Inasmuch as the Act embodies a compromise under which the original Provinces agreed to federate, it is important to keep in mind that the preservation of the rights of minorities was a condition on which such minorities entered into the federation, and the foundation upon which the whole structure was subsequently erected. *The process of interpretation as the years go on ought not to be allowed to dim or to whittle down the provisions of the original contract upon which the federation was founded, nor is it legitimate that any judicial construction of the provisions of ss. 91 and 92 should impose a new and different contract upon the federating bodies.*

Nor do I think that the *Radio* case (1) goes to the length which has been suggested. On the latter reference the legislation considered was the *Radiotelegraph Act*, R.S.C., 1927, c. 195, and the regulations made thereunder, the validity of which the Dominion sought to support on the ground that it was necessary to make provision for performing the obligations of Canada under the Radiotelegraph convention, as well as upon the ground that it was enacted by reason of the expediency of making provision for the regulation of a service essentially important in itself as touching closely the national life and interest.

This convention was the outcome of a meeting of representatives of about 80 countries, including the Dominion of Canada, held in Washington in November, 1927, to settle international agreements on the subject of radiotelegraph communication. The representatives of Canada had been appointed by the Privy Council of Canada with the approval of the Governor General, and the convention was actually signed by these representatives of Canada with the other signatories as plenipotentiaries of the countries named as the high contracting parties. By article 2 the contracting governments undertook to apply the provisions of the convention in all radio communication stations established or operated by the contracting governments, and open to the international service of public correspondence, and also to adopt or to propose to their respective legislatures the measures

1936
REFERENCES
re
THE WEEKLY
REST IN
INDUSTRIAL
UNDERTAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.
CROCKET J.

1936
REFERENCES
re
THE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.
CANNON J.

necessary to impose the observance of the provisions of the convention and the regulations annexed thereto upon individual persons and enterprises authorized to establish and operate radio communication stations and international service, whether or not the stations are open to public correspondence.

The Board, while holding that this convention was not a treaty within the meaning of s. 132 of the B.N.A. Act, did no doubt decide that it was a convention by which Canada must be deemed to have been as firmly bound as if it had been entered into as a formal treaty with foreign governments, and that Canada as a whole was amenable to the other signatory powers for the proper carrying out of the convention, for the reason apparently, as Lord Dunedin pointed out in the passage quoted by the learned Chief Justice from the Board's judgment (1) that Canada as a Dominion is one of the signatories to the convention. It is nowhere suggested in the judgment that either the fact of the Government of Canada being a signatory to the convention by its duly accredited plenipotentiaries or the fact of the Government of Canada having afterwards formally ratified the convention, clothed the Parliament of Canada with any legislative authority beyond that which flows from the provisions of the B.N.A. Act.

The point of the reference to the subject of international conventions and the changes in the status of the Government of Canada in relation to the Imperial Government was, as I take it, to show that the idea of Canada as a Dominion being bound by a convention equivalent to a treaty with foreign powers was unthought of in 1867, when the B.N.A. Act was enacted, and that consequently the subject of international conventions could not be expected to be mentioned explicitly in the Imperial statute in either ss. 91 or 92. "The only class of treaty," said Lord Dunedin,

which would bind Canada was thought of as a treaty by Great Britain and that was provided for by s. 132. Being, therefore, not mentioned explicitly in either s. 91 or s. 92, such legislation falls within the general words at the opening of s. 91, which assigned to the Government of the Dominion the power to make laws "for the peace, order and good govern-

ment of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces." In fine, though agreeing that the convention was not such a treaty as is defined in s. 132, their Lordships think that it comes to the same thing.

that is to say, as I understand it, that the fact of international conventions not having been specifically named in s. 92 among the classes of subjects in relation to which the Provinces are authorized to exclusively make laws, that subject necessarily falls within the residuary clause of s. 91 as a matter "not coming within" any of the classes of subjects enumerated in s. 92. This no doubt may, as their Lordships suggest, amount to the same thing as if the Radiotelegraph convention were in fact such a treaty as is defined in s. 132 in the sense that from the Dominion standpoint it makes no practical difference whether the Parliament of Canada derives its power to enact legislation for the carrying out of the stipulations of an international convention from the provisions of s. 132 or from the fact that the legislation is treated as a matter which does not come within the classes of subjects specified in s. 92, and must therefore fall within the residuary clause of s. 91. I do not think, however, that their Lordships intended to lay it down as an infallible rule for the interpretation of either s. 92 or of the residuary clause of s. 91 itself that the fact that a matter demanding legislative action is not mentioned explicitly in s. 92 decisively excludes it from such a comprehensive class of subjects as is specified in no. 13 of that section—Property and Civil Rights.

The rest of the judgment shows that in addition to the fact of the Government of Canada being a signatory to the convention the Board considered the scope of its stipulations to see whether in their main features they dealt with a subject matter which in reality fell within any of the classes of subjects specified in s. 92, or whether they did not predominantly relate to classes of subjects set out in the enumerated heads of s. 91. Discussing the argument of the province that the convention did not touch the consideration of interprovincial broadcasting, Lord Dunedin says that much the same might have been said as to aeronautics, as it was quite possible to fly with-

1936
REFERENCES
re
THE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.
CROCKET J.

1936
REFERENCES
^{re}
THE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.

CROCKET J.

out going outside the province, yet that was not thought to disturb the general view, and that

the idea pervading that judgment is that the whole subject of aeronautics is so completely covered by the treaty ratifying the convention between the nations, that there is not enough left to give a separate field to the provinces as regards the subject.

Again, His Lordship says:

But the question does not end with the consideration of the convention. Their Lordships draw special attention to the provisions of head 10 of s. 92. These provisions, as has been explained in several judgments of the Board, have the effect of reading the excepted matters into the preferential place enjoyed by the enumerated subjects of s. 91.

Their Lordships held that broadcasting fell within the excepted matters as being an undertaking connecting one province with another, and extending beyond the limits of the province and therefore came within enumerated head 29 of s. 91. "Once it is conceded," he went on to say,

as it must be, keeping in view the duties under the convention, that the transmitting instrument must be, so to speak, under the control of the Dominion, it follows in their Lordships' opinion that the receiving instrument must share its fate. The receiver is indeed useless without a transmitter and can be reduced to a nonentity if the transmitter closes. The system cannot be divided into two parts each independent of the other.

Their Lordships, moreover, held that broadcasting fell within the description of "telegraphs," which subject is excepted from "local works and undertakings," specified in s. 92 (10), and therefore takes its place in 91 (29). In conclusion, Lord Dunedin said:

As their Lordships' views are based on what may be called the pre-eminent claims of s. 91, it is unnecessary to discuss the question which was raised with great ability by Mr. Tilley—namely, whether, if there had been no pre-eminent claims as such, broadcasting could have been held to fall either within "property and civil rights" or within "matters of a merely local or private nature."

It appears, therefore, to me that, while one of the grounds of the decision in the *Radio* case (1) was the form and nature of the convention itself, the basis of the decision, as put in the judgment itself, was "the pre-eminent claims of s. 91," which, I take it to refer to the fact that the subject matter of that convention fell under one of the enumerated heads of s. 91, viz: no. 29. For that reason the authority of Parliament in relation to the subject matter of the convention and of the legislation would override the legislative authority of the provinces in relation thereto, not

because of the residuary clause in the introduction of that section, but in virtue of the declaration that,

notwithstanding anything in this Act, the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects

set forth in the 29 enumerated heads of that section, and the closing words of s. 91 as well that,

Any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

This, as I read the judgment, is the fundamental basis of the decision. Read in this light, it may truly be said to get back to the words of the B.N.A. Act itself and the object with which it was passed, and thus to avoid the danger to which the Board itself so pointedly called attention in the *Aeronautics* case (1) a few months earlier, of the provisions of such a great constitutional charter being so extended or whittled down in the process of judicial interpretation as the years go on as to impose a new and different contract upon the federating bodies than that upon which the whole structure of confederation was erected.

While I agree with the learned Chief Justice that the Government of Canada must now be held to be the proper medium for the formal conclusion of international conventions, whether they affect the Dominion as a whole or any of the provinces separately, I do not think that this fact can be relied on as altering in any way the provisions of the B.N.A. Act as regards the distribution of legislative power as between the Dominion Parliament and the provincial legislatures or as necessarily giving to any matter, which may be made the subject of legislation in Canada, any other meaning or aspect than that which it bears in our original constitution. Whether such a matter is one which falls under the terms of either s. 91 or of s. 92 or of s. 132, must depend upon the real intendment of the B.N.A. Act itself, as gathered from the terms of those sections and the Act as a whole. The original division of legislative power as between the two fields, Dominion and provincial, has remained inviolate to this day, so far as the Imperial Parliament is concerned. The Statute of Westminster itself provides by s. 7 (1) that,

1936

REFERENCES

re

THE WEEKLY

REST IN

INDUSTRIAL

UNDERTAKINGS ACT,

THE

MINIMUM

WAGES ACT,

AND THE

LIMITATION

OF HOURS OF

WORK ACT.

CROCKET J.

1936

REFERENCES

re

THE WEEKLY

REST IN

INDUSTRIAL

UNDER-

TAKINGS ACT,

THE

MINIMUM

WAGES ACT,

AND THE

LIMITATION

OF HOURS OF

WORK ACT.

CROCKET J.

—

Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the B.N.A. Act (1867 to 1930) or to any order, rule or regulation made thereunder.

And by s.s. (3) thereof that,

The powers conferred by this Act upon the Parliament of Canada or upon the Legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the Legislatures of the Provinces respectively.

Seeing that s. 92 so unequivocally assigns all "matters coming within the classes of subjects" enumerated therein to the exclusive jurisdiction of the provincial legislatures, and that the residuary clause of s. 91 is so unequivocally limited to "matters not coming within the classes of subjects" assigned exclusively to the provincial legislatures, I cannot understand how in a controversy as to which of the two legislative fields any particular matter belongs we can look at it otherwise than in its normal aspect within the intendment of these two sections as a subject of legislation, either for the Parliament of Canada or for the provincial legislatures. In such a controversy the primary duty of the Court is to determine whether the real subject matter of the legislation relates to one or more of the classes of subjects which the Act exclusively assigns to the provincial legislatures.

Surely it was never within the contemplation of the Act that the Courts in determining this question should disregard the normal aspect of any matter in its relation to any of these classes of subjects, or that, because through the instrumentality of the Government of Canada in the exercise of its executive authority and functions, it should become the subject matter of an international convention, it should thereby cease to have any relationship to any of the classes of subjects, which the Act has defined as the exclusive prerogative of the legislatures of the provinces and should henceforth be looked at solely from an international point of view. For my part I find it quite impossible to accept such a proposition. If we are not bound by the *Aeronautics* and *Radio* decisions (1) to hold that legislation, which admittedly is directly aimed at the regulation and control of such matters as contracts of employment in respect of the limitation of the hours of labour and the rates of wages in all the provinces alike,

(1) [1932] A.C. 54 and 304.

is legislation relating to a matter which falls to the Parliament of Canada under the residuary clause of s. 91, simply because it has become a matter of national as well as of provincial concern, I can see no logical reason why we are bound to hold that such legislation exclusively vests in the Dominion simply because it relates to a matter which the federal executive has chosen to make a subject matter of an international convention. Both reasons are in my judgment alike irreconcilable with the clear intentment of s. 92 and the residuary clause of s. 91.

As to the suggestion that the fact that s. 92 makes no explicit mention of international conventions necessarily excludes the subject from the ambit of that section and places it in that of the residuary clause, this also in my opinion is wholly inadmissible as being contrary to the plain wording of both sections. Incontrovertibly the residuary clause itself limits the authority of the Dominion Parliament to make laws for the peace, order and good government of Canada to matters, which do not come within *the classes of subjects* assigned exclusively by the Act to the legislatures of the provinces. No matter, which does come within any of these classes of subjects, can legitimately be brought within the operation of the residuary power. There is but one test for determining its application or non-application to any given subject-matter, viz: Does the matter come within any of the classes of subjects, which the Act has assigned exclusively to the legislatures of the provinces? And for the reasons already discussed the given matter must be looked at in its relationship, not to any outside country, but in its relationship to the classes of subjects definitely marked out as the exclusive legislative field of the provinces. The words of the enactment are "matters not coming within the classes of subjects" assigned exclusively to the provinces—not "matters not explicitly mentioned in s. 92." Manifestly many matters may not be explicitly mentioned in the classes of subjects assigned to the provinces and yet unquestionably come within those classes of subjects, particularly such wide and comprehensive classes of subjects as nos. 13 and 16: Property and Civil Rights and "Generally, all matters of a merely local or private nature."

1936
REFERENCES
TO
THE WEEKLY
REST IN
INDUSTRIAL
UNDERTAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.
CROCKETT J.

1936

REFERENCES
TO
THE WEEKLY
REST IN
INDUSTRIAL
UNDER-
TAKINGS ACT,
THE
MINIMUM
WAGES ACT,
AND THE
LIMITATION
OF HOURS OF
WORK ACT.

CROCKET J.

It seems to me that nothing could be more surely calculated to undermine the whole structure of the confederation compact as expressed in the B.N.A. Act in relation to the distribution of legislative power between the Dominion and provincial legislatures than the adoption of such a guide as has been suggested for the interpretation of these all important sections, 91 and 92. It would strip the legislative charter of the provinces of every vestige of permanency and stability and leave it at all times subject to the will and pleasure of the federal executive.

The legislation embodied in these three statutes is admittedly legislation which the Parliament of Canada would never have ventured to enact but for the draft conventions of the International Labour Organization of the League of Nations. These conventions are admittedly conventions, to which the Government of Canada was in no manner bound to assent or to formally ratify. They were submitted to the Government of this country as mere draft conventions, and stood as such until 1935, when the Government of Canada chose to approve them, several years after the expiration of the period fixed by article 405 of the Treaty of Versailles for their submission "to the authority or authorities within whose competence the matter lies for the enactment of legislation or other action." It was argued that this provision of article 405 was merely directory. I think its language is clearly mandatory, and that the ratification of the conventions, upon which these three statutes purport to be founded is null and void under the terms of article 405 of the Treaty of Versailles itself. It is, however, to the provisions of the B.N.A. Act, not to terms of the Treaty of Versailles, that we must look for the answers to the questions submitted to us on this reference concerning the constitutionality of these three statutes. In my opinion they are all wholly *ultra vires* of the Parliament of Canada, for the reasons above stated.

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL,
DELIVERED THE 28th JANUARY, 1937

IN THE MATTER of a Reference as to whether The Weekly Rest in Industrial Undertakings Act; The Minimum Wages Act and The Limitation of Hours of Work Act of the Statutes of Canada, 1935, are ultra vires of the Parliament of Canada.

THE ATTORNEY-GENERAL OF CANADA

Appellant,

v.

THE ATTORNEY-GENERAL OF ONTARIO AND OTHERS

Respondents.

Present at the hearing:

Lord Atkin.

Lord Thankerton.

Lord Macmillan.

Lord Wright (Master of the Rolls).

Sir Sidney Rowlett.

(Delivered by Lord Atkin.)

This is one of a series of cases brought before this Board on Appeal from the Supreme Court of Canada on references by the Governor General in Council to determine the validity of certain statutes of Canada passed in 1934 and 1935. Their Lordships will deal with all the appeals in due course, but they propose to begin with that involving The Weekly Rest in Industrial Undertakings Act, The Minimum Wages Act and The Limitation of Hours of Work Act, both because of the exceptional importance of the issues involved, and because it affords them an opportunity of stating their opinion upon some matters which also arise in the other cases. At the outset they desire to express their appreciation of the valuable assistance which they have received from counsel, both for the Dominion and for the respective Provinces. No pains have been spared to place before the Board all the material both as to the facts and the law which could assist the Board in their responsible task. The arguments were

cogent and not diffuse. The statutes in question in the present case were passed, as their titles recite, in accordance with conventions adopted by the International Labour Organization of the League of Nations in accordance with the Labour Part of the Treaty of Versailles of 28th June, 1919. It was admitted at the bar that each statute affects property and civil rights within each Province; and that it was for the Dominion to establish that nevertheless the statute was validly enacted under the legislative powers given to the Dominion Parliament by the B.N.A. Act, 1867. It was argued for the Dominion that the legislation could be justified either (1) under section 132 of the B.N.A. Act as being legislation "necessary or proper for performing the obligations of Canada or any Province thereof as part of the British Empire towards foreign countries arising under treaties between the Empire and such foreign countries" or (2) under the general powers, sometimes called the residuary powers, given by section 91 to the Dominion Parliament to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the Provinces.

The Provinces contended:—

As to (1)—

(a) That the obligations, if any, of Canada under the labour conventions did not arise under a treaty of treaties made between the Empire and foreign countries: and that therefore section 132 did not apply.

(b) That the Canadian Government had no executive authority to make any such treaty as was alleged.

(c) That the obligations said to have been incurred and the legislative powers sought to be exercised by the Dominion were not incurred and exercised in accordance with the terms of the Treaty of Versailles.

As to (2) that if the Dominion had to rely only upon the powers given by section 91, the legislation was invalid, for it related to matters which came within the classes of subjects exclusively assigned to the legislatures of the Provinces, viz. property and civil rights in the Province.

In order to indicate the opinion of the Board upon these contentions it will be necessary briefly to refer to the Treaty of Versailles, Part XIII, Labour: to the procedure prescribed by it for bringing into existence labour conventions: and to the procedure adopted in Canada in respect thereto. The Treaty of Peace signed at Versailles on 28th June, 1919, was made between the Allied and Associated Powers,

and the High Contracting Party for the British Empire was His Majesty the King, represented generally by certain of his English Ministers and represented for the Dominion of Canada by the Minister of Justice and the Minister of Customs, and for the other Dominions by their respective Ministers. The treaty began with Part I of the covenant of the League of Nations by which the high contracting parties agreed to the covenant, the effect of which was that the signatories named in the annex to the covenant were to be the original members of the League of Nations. The Dominion of Canada was one of the signatories and so became an original member of the League. The treaty then proceeds in a succession of parts to deal with the agreed terms of peace, stipulations of course entered into not between members of the League but between the high contracting parties, i.e., for the British Empire His Majesty the King. Part XIII entitled "Labour," after reciting that the object of the League of Nations is the establishment of universal peace, and such a peace can only be established if it is based on social justice and that social justice requires the improvement of conditions of labour throughout the world provides that the high contracting parties agree to the establishment of a permanent organization for the promotion of the desired objects and that the original and future members of the League of Nations shall be the members of this organization. The organization is to consist of a general conference of representatives of the members and an International Labour Office. After providing for meetings of the conference and for its procedure the treaty contains articles 405 and 407:—

"ARTICLE 405

"(1) When the Conference has decided on the adoption of proposals with regard to an item in the agenda, it will rest with the Conference to determine whether these proposals should take the form: (a) of a recommendation to be submitted to the Members for consideration with a view to effect being given to it by national legislation or otherwise, or (b) of a draft international convention for ratification by the Members.

"(2) In either case a majority of two-thirds of the votes cast by the Delegates present shall be necessary on the final vote for the adoption of the recommendation or draft convention, as the case may be, by the Conference.

"(3) In framing any recommendation or draft convention of general application the Conference shall have due regard to those countries in which climatic conditions, the imperfect

development of industrial organization or other special circumstances make the industrial conditions substantially different and shall suggest the modifications, if any, which it considers may be required to meet the case of such countries.

“(4) A copy of the recommendation or draft convention shall be authenticated by the signature of the President of the Conference and of the Director and shall be deposited with the Secretary-General of the League of Nations. The Secretary-General will communicate a certified copy of the recommendation or draft convention, to each of the Members.

“(5) Each of the Members undertakes that it will, within the period of one year at most from the closing of the session of the Conference, or if it is impossible owing to exceptional circumstances to do so within the period of one year, then at the earliest practicable moment and in no case later than eighteen months from the closing of the session of the Conference bring the recommendation or draft convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action.

“(6) In the case of a recommendation the Members will inform the Secretary-General of the action taken.

“(7) In the case of a draft convention, the Member will, if it obtains the consent of the authority or authorities within whose competence the matter lies, communicate the formal ratification of the convention to the Secretary-General and will take such action as may be necessary to make effective the provisions of such convention.

“(8) If on a recommendation no legislative or other action is taken to make a recommendation effective, or if the draft convention fails to obtain the consent of the authority or authorities within whose competence the matter lies, no further obligation shall rest upon the Member.

“(9) In the case of a federal State, the power of which to enter into conventions on labour matters is subject to limitations, it shall be in the discretion of that Government to treat a draft convention to which such limitations apply as a recommendation only, and the provisions of this Article with respect to recommendations shall apply in such case.

“(10) The above Article shall be interpreted in accordance with the following principle:—

“In no case shall any Member be asked or required, as a result of the adoption of any recommendation or draft conven-

tion by the Conference, to lessen the protection afforded by its existing legislation to the workers concerned.

“ARTICLE 407

“If any convention coming before the Conference for final consideration fails to secure the support of two-thirds of the votes cast by the Delegates present, it shall nevertheless be within the right of any of the Members of the Permanent Organization to agree to such convention among themselves.

“Any convention so agreed to shall be communicated by the Government concerned to the Secretary-General of the League of Nations, who shall register it.”

It will be observed that a draft convention is adopted by a majority of two-thirds of the delegates present: and that at the stage of adoption it has no binding effect on the members: nor do the delegates of members sign it or purport to enter into an obligation on behalf of the members whose delegates they are. “Ratification,” therefore, as used in paragraph 7 of Article 405 is not used in the ordinary sense in which it is used in respect of treaties, the formal adoption by the high contracting party of a previous assent conveyed by the signature of so-called plenipotentiaries. “Consent to” or “accession to” would perhaps better describe the transaction which involves the creation for the first time of any obligation under the convention.

In accordance with the provisions of Part XIII draft conventions were adopted by general conferences of the International Labour Organization as follows:—

29th October-29th November, 1919, Conference.

Draft Convention limiting the Hours of Work in Industrial Undertakings.

25th October-19th November, 1921, Conference.

Draft Convention concerning the Application of The Weekly Rest in Industrial Undertakings.

30th May-16th June, 1928, Conference.

Draft Convention concerning the creation of Minimum Wage Fixing Machinery.

Each of the conventions included stipulations purporting to bind members who ratified it to carry out its provisions, the first two conventions by named dates, viz. 1st July, 1921, and 1st January, 1924, respectively. These three conventions were in fact ratified by the Dominion of Canada, Hours of Work on 1st March, 1935, Weekly Rest on 1st March, 1935, and Minimum Wages on 12th April, 1935.

In each case in February and March, 1935, there had been passed resolutions of the Senate and House of Commons of Canada approving them. The ratification as approved by order of the Governor General in Council was recorded in an instrument of ratification executed by the Secretary of State for External Affairs for Canada, Mr. Bennett, and was duly communicated to the Secretary-General of the League of Nations. The statutes which in substance give effect to the draft conventions, were passed by the Parliament of Canada and received the Royal Assent, "Hours of Work" on 5th July, 1935, to come into force three months after assent; "Weekly Rest," on 4th April, 1935, to come into force three months after assent; "Minimum Wage," on 28th July, 1935, to come into force, so far as the convention provisions are concerned, when proclaimed by the Governor in Council, an event which has not yet happened. In 1925 the Governor General in Council referred to the Supreme Court questions as to the obligations of Canada under the provisions of Part XIII of the Treaty of Versailles and as to whether the legislatures of the Provinces were the authorities within whose competence the subject matter of the conventions lay. The answers to the reference which are to be found in 1925 S.C.R. 505, were that the legislatures of the Provinces were the competent authorities to deal with the subject matter, save in respect of Dominion servants, and the parts of Canada not within the boundaries of any Province: and that the obligation of Canada was to bring the convention before the Lieutenant-Governor of each Province to enable him to bring the appropriate subject matter before the legislature of his Province, and to bring the matter before the Dominion Parliament in respect of so much of the convention as was within their competence. This advice appears to have been accepted, and no further steps were taken until those which took place as stated above in 1935.

Their Lordships, having stated the circumstances leading up to the reference in this case, are now in a position to discuss the contentions of the parties which were summarized earlier in this judgment. It will be essential to keep in mind the distinction between (1) the formation, (2) the performance, of the obligations constituted by a treaty, using that word as comprising any agreement between two or more sovereign States. Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty

alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes. To make themselves as secure as possible they will often in such cases before final ratification seek to obtain from Parliament an expression of approval. But it has never been suggested, and it is not the law, that such an expression of approval operates as law, or that in law it precludes the assenting Parliament or any subsequent Parliament from refusing to give its sanction to any legislative proposals that may subsequently be brought before it. Parliament, no doubt, as the Chief Justice points out, has a constitutional control over the executive; but it cannot be disputed that the creation of the obligations undertaken in treaties and the assent to their form and quality are the function of the executive alone. Once they are created, while they bind the State as against the other contracting parties, Parliament may refuse to perform them and so leave the State in default. In a unitary State whose legislature possesses unlimited powers the problem is simple. Parliament will either fulfil or not treaty obligations imposed upon the State by its executive. The nature of the obligations does not affect the complete authority of the legislature to make them law if it so chooses. But in a State where the legislature does not possess absolute authority: in a federal State where legislative authority is limited by a constitutional document: or is divided up between different legislatures in accordance with the classes of subject matter submitted for legislation, the problem is complex. The obligations imposed by treaty may have to be performed, if at all, by several legislatures: and the executive have the task of obtaining the legislative assent not of the one Parliament to whom they stand in no direct relation. The question is not how is the obligation formed, that is the function of the executive: but how is the obligation to be performed and that depends upon the authority of the competent legislature or legislatures.

Reverting again to the original analysis of the contentions of the parties it will be seen that the Provincial contention I (b) relates only to the formation of the treaty obligation while I (c) has reference to the alleged limitation of both executive and legislative action by the express terms of the treaty. If, however, the Dominion Parliament was never vested with legislative authority to perform the obligation these question do not arise. And as their Lordships have come to the conclusion that the reference can be decided upon the question of legislative competence alone, in ac-

cordance with their usual practice in constitutional matters they refrain from expressing any opinion upon the questions raised by the contentions I (b) and (c), which in that event become immaterial. Counsel did not suggest any doubt as to the international status which Canada had now attained, involving her competence to enter into international treaties as an international juristic person. Questions were raised both generally as to how the executive power was to be exercised to bind Canada, whether it must be exercised in the name of the King, and whether the prerogative right of making treaties in respect of Canada, was now vested in the Governor General in Council, or his Ministers, whether by constitutional usage or otherwise, and specifically in relation to the draft conventions as to the interpretation of the various paragraphs in Article 405 of the Treaty of Versailles and as to the effect of the time limits expressed both in Article 405 and in the conventions themselves. Their Lordships mention these points for the purpose of making it clear that they express no opinion upon them.

The first ground upon which counsel for the Dominion sought to base the validity of the legislation was section 132. So far as it is sought to apply this section to the conventions when ratified the answer is plain. The obligations are not obligations of Canada as part of the British Empire, but of Canada, by virtue of her new status as an international person, and do not arise under a treaty between the British Empire and foreign countries. This was clearly established by the decision in the *Radio* case (1932) A.C. 304, and their Lordships do not think that the proposition admits of any doubt. It is unnecessary, therefore, to dwell upon the distinction between legislative powers given to the Dominion to perform obligations imposed upon Canada as part of the Empire by an Imperial executive responsible to and controlled by the Imperial Parliament, and the legislative power of the Dominion to perform obligations created by the Dominion executive responsible to and controlled by the Dominion Parliament. While it is true, as was pointed out in the *Radio* case, that it was not contemplated in 1867 that the Dominion would possess treaty making powers; it is impossible to strain the section so as to cover the un contemplated event. A further attempt to apply the section was made by the suggestion that while it does not apply to the conventions, yet it clearly applies to the Treaty of Versailles itself, and the obligations to perform the conventions arise "under" that treaty because of the stipulations in Part XIII. It is impossible to accept this view. No obligation to legislate in respect of any of the matters in question arose until the Canadian executive, left with an unfettered discretion of their own volition, acceded to the con-

ventions, a *novus actus* not determined by the treaty. For the purposes of this legislation the obligation arose under the conventions alone. It appears that all the members of the Supreme Court rejected the contention based on section 132 and their Lordships are in full agreement with them.

If, therefore, section 132 is out of the way the validity of the legislation can only depend upon sections 91 and 92. Now it had to be admitted that normally this legislation came within the classes of subjects by section 92 assigned exclusively to the legislatures of the Provinces, viz. property and civil rights in the Province. This was in fact expressly decided in respect of these same conventions by the Supreme Court in 1925. How then can the legislation be within the legislative powers given by section 91 to the Dominion Parliament? It is not within the enumerated classes of subjects in section 91: and it appears to be expressly excluded from the general powers given by the first words of the section. It appears highly probable that none of the members of the Supreme Court would have departed from their decision in 1925 had it not been for the opinion of the Chief Justice that the judgments of the Judicial Committee in the *Aeronautics* case and the *Radio* case constrained them to hold that jurisdiction to legislate for the purpose of performing the obligation of a treaty resides exclusively in the Parliament of Canada. Their Lordships cannot take this view of those decisions. The *Aeronautics* case (1932) A.C. 54, concerned legislation to perform obligations imposed by a treaty between the Empire and foreign countries. Section 132 therefore clearly applied; and but for a remark at the end of the judgment, which in view of the stated ground of the decision was clearly obiter, the case could not be said to be an authority on the matter now under discussion. The judgment in the *Radio* case (*supra*) appears to present more difficulty. But when that case is examined it will be found that the true ground of the decision was that the convention in that case dealt with classes of matters which did not fall within the enumerated classes of subjects in section 92 or even within the enumerated classes in section 91. Part of the subject matter of the convention, namely broadcasting, might come under an enumerated class but if so it was under a heading "Inter-provincial Telegraphs," expressly excluded from section 92. Their Lordships are satisfied that neither case affords a warrant for holding that legislation to perform a Canadian treaty is exclusively within the Dominion legislative power.

For the purposes of sections 91 and 92, i.e., the distribution of legislative powers between the Dominion and the Provinces, there is no such thing as treaty legislation as such. The distribution is

based on classes of subjects: and as a treaty deals with a particular class of subjects so will the legislative power of performing it be ascertained. No one can doubt that this distribution is one of the most essential conditions, probably the most essential condition, in the interprovincial compact to which the B.N.A. Act gives effect. If the position of Lower Canada, now Quebec, alone were considered, the existence of her separate jurisprudence as to both property and civil rights might be said to depend upon loyal adherence to her constitutional right to the exclusive competence of her own legislature in these matters. Nor is it of less importance for the Provinces, though their law may be based on English jurisprudence, to preserve their own right to legislate for themselves in respect of local conditions which may vary by as great a distance as separates the Atlantic from the Pacific. It would be remarkable that while the Dominion could not initiate legislation however desirable which affected civil rights in the Provinces, yet its Government not responsible to the Provinces nor controlled by Provincial Parliaments need only agree with a foreign country to enact such legislation: and its Parliament would be forthwith clothed with authority to affect Provincial rights to the full extent of such agreement. Such a result would appear to undermine the constitutional safeguards of Provincial constitutional autonomy.

It follows from what has been said that no further legislative competence is obtained by the Dominion from its accession to international status, and the consequent increase in the scope of its executive functions. It is true, as pointed out in the judgment of the Chief Justice, that as the executive is now clothed with the powers of making treaties so the Parliament of Canada, to which the executive is responsible, has imposed upon it responsibilities in connection with such treaties, for if it were to disapprove of them they would either not be made or the Ministers would meet their constitutional fate. But this is true of all executive functions in their relation to Parliament. There is no existing constitutional ground for stretching the competence of the Dominion Parliament so that it becomes enlarged to keep pace with enlarged functions of the Dominion executive. If the new functions affect the classes of subjects enumerated in section 92 legislation to support the new functions is in the competence of the Provincial Legislatures only. If they do not, the competence of the Dominion Legislature is declared by section 91 and existed *ab origine*. In other words the Dominion cannot merely by making promises to foreign countries clothe itself with legislative authority inconsistent with the constitution which gave it birth.

But the validity of the legislation under the general words of section 91 was sought to be established not in relation to the treaty-making power alone, but also as being concerned with matters of such general importance as to have "attained such dimensions as to affect the body politic," and to have "ceased to be merely local or provincial and to have become matters of national concern." It is interesting to notice how often the words used by Lord Watson in *A.G. for Ontario v. A.G. for Canada* (1896) A.C. 348, have unsuccessfully been used in attempts to support encroachments on the Provincial legislative powers given by section 92. They laid down no principle of constitutional law, and were cautious words intended to safeguard possible eventualities which no one at the time had any interest or desire to define. The law of Canada on this branch of constitutional law has been stated with such force and clarity by the Chief Justice in his judgment in the reference concerning the Natural Products Marketing Act, beginning at p. 65 of the record in that case and dealing with the six Acts there referred to, that their Lordships abstain from stating it afresh. The Chief Justice naturally from his point of view excepted legislation to fulfil treaties. On this their Lordships have expressed their opinion. But subject to this they agree with and adopt what was there said. They consider that the law is finally settled by the current of cases cited by the Chief Justice on the principle declared by him. It is only necessary to call attention to the phrases in the various cases, "abnormal circumstances," "exceptional conditions," "standard of necessity" (Board of Commerce case (1922) 1 A.C. 191), "some extraordinary peril to the national life of Canada," "highly exceptional," "epidemic of pestilence" (Sniders case (1925) A.C. 396), to show how far the present case is from the conditions which may override the normal distribution of powers in sections 91 and 92. The few pages of the Chief Justice's judgment will, it is to be hoped, form the *locus classicus* of the law on this point, and preclude further disputes.

It must not be thought that the result of this decision is that Canada is incompetent to legislate in performance of treaty obligations. In totality of legislative powers, Dominion and Provincial together, she is fully equipped. But the legislative powers remain distributed and if in the exercise of her new functions derived from her new international status she incurs obligations they must, so far as legislation be concerned when they deal with provincial classes of subjects, be dealt with by the totality of powers, in other words by co-operation between the Dominion and the Provinces. While the ship of state now sails on larger ventures and into foreign waters she still

retains the water-tight compartments which are an essential part of her original structure. The Supreme Court was equally divided and therefore the formal judgment could only state the opinions of the three Judges on either side. Their Lordships are of opinion that the answer to the three questions should be that the Act in each case is *ultra vires* of the Parliament of Canada, and they will humbly advise His Majesty accordingly.

Statutes
Canada

340991
Canada. Statutes

~~Law~~ ~~Lib.~~

In the matter of a reference as to whether
the Parliament of Canada had legislative
jurisdiction to enact The Employment and
Social Insurance Act 1935

Acme Library Card Pocket
LOWE-MARTIN CO. LIMITED

DO NOT
REMOVE
THE
CARD
FROM
THIS
POCKET

For use in
the Library
ONLY

of Toronto
ry

